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IF the decision of the Massachusetts court in the case of Miller v. Horton, printed in full with note in this issue, is correct, and we do not doubt it, the members of boards of health in that State, and in other States having similar statutes, will do well to go slow in the matter of taking or destroying private property summarily as nuisances. It seems unfair to hold a member of such a body responsible personally in damages for a mistake simply of judgment as to what is or what is not a nuisance under the statute, but there does not seem to be any escape from such conclusion, which otherwise would leave constitutional rights of property without effective remedy.

IN a recent number (31 Cent. L. J., 121), we called attention to a late English ruling by Justice Kekewich, which caused much consternation in English banking circles. The ruling, succinctly stated, was that the mere fact that a person depositing securities to obtain an advance from a bank is a stock broker, is sufficient to put the bank on inquiry whether the securities are the would-be borrower's own property. This decision was grounded upon the ruling of the House of Lords in the Earl of Sheffield's case, which was a case of a money lender and not a stock broker, and excited much adverse criticism as not being justified by the decision in the latter case, and as being a very radical extension of the law governing the pledging of stock certificates. The English court of appeals, however, has since affirmed the decision, holding that the bank, to whom stock was pledged by the stock broker, never became *bona fide* holders for value without notice, but had chosen to shut their eyes to a necessary part of the inquiry which the character of the pledgor as a stock broker should have suggested. This is straining the doctrine of notice beyond anything which has so far been done in England, except, perhaps, in the Earl of Sheffield's case. If the law of that case is good, it is so also in the case of any one pledging a bank note or other strictly negotiable security, when the pledgee knows that the security may belong to a third person. A mortgagee has long been held to be a purchaser for value. The question, therefore, arises, are all purchasers for value to be affected with notice when they purchase a negotiable instrument, knowing that it may belong to a third person. In all cases they certainly know of that possibility. The decision, in fact, upsets one's notions of the effect of a transfer of a negotiable instrument, and it will be curious to watch its fate before the House of Lords.

NO cases in this country have even leaned in the direction of the law as thus laid down by the English courts. While not in terms or legal effect negotiable instruments, yet stock certificates taken as collateral security in good faith for value, and without notice, are fully protected in the hands of pledgees, although their pledgors may themselves have actually held such certificates in pledge only, or as agents, executors, trustees, etc. And such *bona fide* pledgee is equally protected, whether the certificates are indorsed directly to him by his immediate pledgor, or have been indorsed in blank by some previous holder, and passed to the pledgee by mere delivery. The possession of certificates of stock duly indorsed in blank, with the irrevocable power of attorney, is presumptive evidence of ownership in the holder; and if he pledge the same by delivery for value, and in the usual course of business, such pledgee without notice can hold the stock as against the real owner and the corporation, although the act of pledge was really a fraud and misappropriation of the certificates by the person intrusted therewith, so as to have the apparent ownership. This results from the application of the doctrine of equitable estoppel. As a matter of fact, under these rules the pledgors of stock certificates have practically no protection as to their stock, except in the honesty and responsibility of their pledgees. A case in this country holding that *prima facie* a person pledging stock in any particular capacity, either as stock broker or otherwise, is pledging the collateral belonging to some one else, would be regarded as an anomaly.

THOSE interested in the general subject of the rights and liabilities of banks holding cor-

porate stock as collateral, will find a very interesting address in the published proceedings of the Iowa Bankers' Association, delivered before that body by Charles B. Keeler. One of the points discussed by him in that address is, how can the creditor avail himself of his stock security, and yet escape his responsibility as a stockholder. After referring to the statutes on this subject, he concludes that, under the law of many of the States, the only safe course for banks loaning money upon a security of corporate stocks as collateral, is to have the new certificates issued in the name of trustees, and so carried upon the books of the corporation, taking from the trustee an irrevocable power of attorney to transfer stock upon demand, and in the meantime retaining possession of the certificates themselves. But, in such case, both the bank and the trustee should refrain from exercising the ordinary rights of shareholders as voting the stock, drawing dividends, etc. The practical objection to such trusteeship is, that, in the absence of statute, it involves the trustee in the very liability from which the creditor seeks to escape. A trustee of stock who is recorded on the corporate books as a stockholder, is at common law liable on such stock, as though he were the absolute owner of the same. This is the rule, even though he is recorded on the corporate books not as an absolute owner, but as a trustee of the stock. Therefore, from necessity such trustee must be an irresponsible person or "dummy," which is hardly satisfactory in legitimate business. The whole question should be regulated by statute.

NOTES OF RECENT DECISIONS.

MUNICIPAL CORPORATIONS — DEFECTIVE HIGHWAYS—BRIDGES.—The Supreme Court of Indiana, in City of Wabash v. Carver, 26 N. E. Rep. 42, held that a city is not liable for injuries through the giving way of a bridge maintained by it as a part of a highway, caused by the injured person driving upon the bridge a steam traction engine with water-tank and threshing-machine attached, where it is not alleged that the structure was designed to carry loads equal in weight to that under which it gave way, or that it was being used in the ordinary method when it gave way; and it is for the person contemplating such use to himself to ascertain the probable sufficiency of the bridge. Mitchell, J., says:

It is settled by the decision of this court that a city is responsible for an injury sustained by one in the lawful and proper use of a bridge within the jurisdiction and charge of the municipality, in case the injury results from the neglect of the city to keep the bridge in repair, and safe for ordinary travel. City of Goshen v. Myers, 119 Ind. 196, 21 N. E. Rep 657; Lowrey v. City of Delphi, 55 Ind. 250. Bridges are constructed, however, to facilitate the transportation of persons and property according to the usual, known, and ordinary modes of travel; and the municipality must be deemed to have discharged its duty to the public if it has constructed and maintained bridges reasonably safe and convenient for the carriage of such animals and vehicles, and for the sustaining of such loads, as are customarily driven and transported over the public highways of the State. It is not incumbent upon cities or counties to construct or maintain all the bridges within their respective jurisdiction so as to be safe or convenient for those who undertake to use them in an unusual or extraordinary manner, or for those who travel by methods involving peculiar and special hazard. While it is true that municipalities, upon whom is laid the duty of keeping bridges in repair, and reasonably safe for use by the public, are bound to take notice of all the improved means of locomotion as they come into customary use, and of the application of steam as a motor in propelling or driving heavy vehicles over public highways, and while the duty rests upon them to afford reasonably safe and convenient facilities for transportation and travel by any and all methods, as soon as those methods become customary, it by no means follows that the dimensions and strength of all bridges in a city or county must be accommodated to new, exceptional, and extraordinary uses. The rule applicable is well stated in the following language: "The duty to maintain a bridge in a safe condition requires that ordinary care be used to keep the bridge in such a condition as that it can be crossed safely by persons traveling in the ordinary mode, and by vehicles carrying ordinary loads. There is no liability where the vehicle is overloaded, or loaded in an extraordinary mode." Elliott, Roads & S. 50.

We know judicially that there is more than one public highway leading out of the city of Wabash across the canal and river upon the bank of which the city is built, and that bridges span these streams at various points within the limits of the city. We cannot know judicially that steam traction-engines have come into such common use as that it would be negligence on the part of the city not to keep all the bridges which span the canal in such a state of repair, or to construct them of such strength and dimensions, as to sustain the weight of a traction-engine, with a water-tank and threshing-machine attached. As we have seen, the city was only bound to construct bridges of such dimensions and strength, and keep them in such a state of repair, as to afford facilities for the ordinary travel, or for the customary use to which they were devoted, and for which they were designed, or to such public use, even though it might only be occasional, as the city knew they were being devoted to, in reliance upon their dimensions and apparent strength. Engine Works v. Kimbal Tp., 52 Mich. 146, 17 N. W. Rep. 733; McCormick v. Washington Tp., 112 Pa. St. 185, 4 Atl. Rep. 164; Stibbins v. Tp. of Keene, 60 Mich. 214; Lehigh Co. v. Haffort, 116 Pa. St. 119.

CARRIERS OF PASSENGERS—LIMITING LIABILITY—EXPRESS MESSENGERS—NEGLIGENCE.—A novel and interesting case, involving the liability of carriers, decided by the Court of Appeals of New York, is Brewer v. N. Y. L. E. & W. R. Co., 26 N. E. Rep. 324, where it was held that an express messenger in charge of an express car carried upon a railroad, in pursuance of a contract between his employer and the railroad company, is not chargeable, in the absence of actual notice, with knowledge of a stipulation therein, under which it is claimed that the railroad company is exempt from liability for negligently causing his death. The contract with the express company cannot operate to relieve the railroad company from the same duty to protect the messenger that it owes any other passenger, or from the same liability for its negligence. Bradley, J., says, after considering how far the carrier might, with the knowledge and assent of the express messenger, have limited its liability, says:

It, however, does not appear that the plaintiff's intestate had any knowledge or information of the provisions of the contract between the two companies. When he entered into the service of the express company, he assumed the ordinary hazards incident to that business in his relation to that company, but there was no presumption, or implied understanding, that the messenger took upon himself the risks of injury he might suffer from the negligence or fault of the defendant. He was in no sense the employee of the defendant, nor could he, without his consent, be subjected to the responsibilities of that relation. Railway Co. v. Ivy, 71 Tex. 409. He was lawfully in the car, having the charge of the property and business there of the express company under its employment; and, although he paid no fare to the defendant, was carried by virtue of no contract made by him personally with the latter, and must have understood that he was there pursuant to some arrangement of his employer with the defendant, he was not necessarily by that fact chargeable with notice of the provisions in question of the contract. Presumptively, he was entitled to protection against personal injury by the negligence of the defendant. Blair v. Railway Co., 66 N. Y. 313; Nolton v. Railway Co., 15 N. Y. 444; Smith v. Railroad Co., 24 N. Y. 222, 29 Barb. 132; Collett v. Railroad Co., 16 Adol. & E. (N. S.) 984. And it is not seen how Brewer could, without his knowledge or consent, be placed in such relation to the defendant as to relieve it from liability to him for the consequences of its negligence affecting him personally. His contract of employment with the express company for its service did not, so far as appears, impose upon him such hazards, nor was he chargeable with the stipulations in the contract between those companies, except so far as they, through notice to him, or otherwise, entered into that, pursuant to which he went into, or remained in, the service of the express company. The negligence of the defendant was the violation of its duty. It was the want of the care to which the plaintiff's intestate was entitled for his protection. This duty, and such right, did not depend or rest upon contract, but upon the relation as carrier of the plaintiff, and the care which the defendant, as such, was required to exercise.

ELECTIONS—CONSTITUTIONAL LAW—CUMULATIVE VOTING—MINORITY REPRESENTATION.—The case of Maynard v. Board of Dist. Canvassers, 47 N. W. Rep. 756, decided by the Supreme Court of Michigan, involves the validity of a statute of that State providing for cumulative voting in the interest of minority representation. It was held that the State constitution prohibits, by implication, any elector from casting more than one vote for any candidate for office, and such has been the practical construction of the constitution ever since its adoption; and hence Acts Mich. 1889, No. 254, which provides for a cumulative system of voting for representatives to the State legislature in districts where more than one is to be chosen, by permitting each elector to cast as many votes for a single representative as there are representatives to be elected, is unconstitutional. Cahill, J., dissented. The history of such innovations into the electoral laws of this country are thus stated by Champlin, C. J.:

There has been in the latter half of the present century a growing desire to secure to minorities a proportionate representation in legislative and corporate bodies, and from time to time schemes have been advocated by those who have desired to bring about what they claim as a reform in existing modes of election to secure to the minority a just and proportionate representation. These schemes may all be reduced to four well-recognized classes, viz.: The "restrictive," which requires a certain number to be elected on one ticket, and prohibits any elector from voting for the whole number to be elected. Thus, if four are to be elected, no one can vote for more than two. (2) The "cumulative," which requires three or more to be elected, and permits the elector to cast as many votes as there are persons to be elected, and to distribute votes among the candidates as the elector may choose. (3) The "Geneva," "free vote," or "Gilpin" plan. By this plan the districts are required to be large, and each party puts in nomination a full ticket, and each voter casts a single ballot. The whole number of ballots having been ascertained, that sum is divided by the number of places to be filled, and each ticket is entitled to the places in proportion to the number of votes cast by it, taking the persons elected from the head of the tickets. This plan doubtless comes the nearest to a proportionate representation of the minority of any plan devised which is practical for popular elections. It was originated by Mr. Gilpin in 1844, who advocated it in a pamphlet published in Philadelphia. It has never been adopted in this country, but has become the *liste libre* of Geneva, and is said to work well in Switzerland. The fourth plan is what is known as the "Hare" plan, or

"single vote." This method is too intricate and tedious ever to be adopted for popular elections by the people. It requires successive counts and redistribution of the votes until an election is reached. The effort to realize the minority representation by the use of the restrictive method was tried in Ohio, under an act passed in that State. The law was declared unconstitutional by the supreme court. State v. Constantine, 42 Ohio St. 437. That court held that it was the right of every elector to vote for every candidate or person to fill the offices provided by law to be elected by vote of electors, and a law which said that no person could vote for more than two of the four persons to be elected took away from the elector a substantial right guarantied to him by the constitution. In Pennsylvania, Mr. Buckalewe for many years advocated the adoption of the system of cumulative voting in order to secure minority representation; and, mainly through his efforts, in 1874, a provision was inserted to the constitution of Pennsylvania (article 16, § 4) permitting stockholders in corporations to vote cumulatively upon the shares of stock. It was held in Hays v. Com., 82 Pa. St. 518, that, as to corporations existing at the time the constitutional provision was adopted, the constitutional provision could not apply, because it interfered with and affected existing vested rights. In 1870 the State of Illinois adopted a new constitution which contains this provision (article 4, §§ 7, 8): "The house of representatives shall consist of three times the number of the members of the senate, and the term of office shall be two years. The representatives shall be elected in each senatorial district at the general election in the year of our Lord, 1872, and every two years thereafter. In all elections of representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates as he shall see fit, and the candidates highest in votes shall be declared elected." In Nebraska (article 11, § 5), in West Virginia (article 11, § 4), in Missouri (article 12, § 6), and in California (article 12, § 12), by constitutional enactment, cumulative voting is permitted upon stock in corporations. So far as I am aware, Illinois is the only State which has tried the experiment of cumulative voting for members of the legislature. It is significant that all the States which have authorized such voting have submitted it to the people for their adoption as a part of the fundamental law. In Ohio the legislature endeavored to authorize it without a constitutional amendment, and it was declared unconstitutional. In New York there has been legislation sanctioning such voting in certain cases; and although the question has been twice before the court of appeals of that State, that court found a way of disposing of the cases in which the questions were raised without passing upon the constitutionality of the law. People v. Crissey, 91 N. Y. 616; People v. Kenney, 96 N. Y. 294.

The conclusion is reached that the Michigan statute not being a part of the organic law, as in most States where such laws have been upheld, it is invalid as in derogation of the implied powers of the constitution.

EMINENT DOMAIN — STREETS — ELECTRIC RAILWAY—POLES AND WIRES.—The question as to the right of electric railways to erect poles and wires in streets, is of present and growing interest, and on that point the case of Lockhart v. Craig St. Ry. Co., 21 Atl. Rep. 26, decided by the Supreme Court of Pennsylvania, will shed some light. It is there held that the construction of car tracks in the streets of a city, and the erection of poles along the sides thereof, on which wires are suspended across and along the street, are not such a new taking of the street, or the imposition of such additional servitude on the property of adjoining owners, as will entitle them to compensation; and injunction will not lie to restrain such operation, on the ground that the acts of the legislature authorizing them have made no provision for securing in advance damages occasioned thereby. The court says:

"But another question arises in reference to the posts placed in the ground for the support of the wires by means of which the cars are moved. It has generally been understood, in Pennsylvania, that the abutting owner had a fee to the middle of the adjoining street, and that the public only has a right of passage over it. Chambers v. Furry, 1 Yeates, 167; Lewis v. Jones, 1 Pa. St. 336. But this must not be taken in its literal sense, especially in towns and cities. What might be considered an invasion of private right, so far as the use of a highway is concerned, in the country, might not be so in a city. Thus a city, by virtue of its general authority, may build sewers in streets, and the adjoining proprietor is not entitled to have damages assessed as for a new use or servitude. Fisher v. Harrisburg, 2 Grant. Cas. 291; Cone v. Hartford, 28 Conn. 363; Traphagen v. Jersey City, 29 N. J. Eq. 206; Michener v. Philadelphia, 118 Pa. St. 535, 12 Atl. Rep. 174. In such case, the street is not only used without compensation to the adjoining owner, but he is compelled to pay for the use of the sewer. So the right to lay down gas-pipes in streets as given by the legislature to municipal authorities, without allowing compensation, has been recognized by the courts; and, while it has not been expressly ruled in Pennsylvania, that I know of, Justice Sterrett, in Sterling's Appeal, 2 Atl. Rep. 105, while deciding that a gas line was an additional burden which entitled the owner to damages in the country, said: "As to the streets and alleys in cities and boroughs, there are reasons why a different rule, to some extent, should prevail." Such has been taken to be the law in cities by common consent. I do not think that any one ever heard of a suit in Pennsylvania to recover damages for injury done merely by running a gas-pipe along the street, in front of his premises, under municipal authority. So with water-pipes, awning-posts, fire-plugs, and lamp-posts. These all, more or less, impinge upon the absolute right of an owner of the soil, and are not necessary to accommodate public travel, or even consistent with the public right to an unobstructed passage-way, And it may be now taken as settled that the owners' rights of abutting property are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial legitimate street uses, as the public may from time to time require. The use of streets

for sewers, tunneling, public cisterns, gas-pipes, water-pipes, and other improvements necessary for the comfort and convenience of the citizens of cities and towns, so long as they do not substantially interfere with the use of the streets as such appear to be under legislative and municipal control. Dill. Mun. Corp. § 699. The case of Taggart v. Railway Co., 19 Atl. Rep. 326 (decided this year by the Supreme Court of Rhode Island), is directly in point, and, if good law, covers the case in hand. My own impression is that the use of poles, wires, and other necessary appliances, such as proposed, being used by defendants, is not, in any respect, a greater interference with the ownership of the adjoining property owner on a street than the use of streets for fire-plugs, horse-troughs, and lamp-posts which have long and generally been recognized as within the power and control of the city government.

ACTION AGAINST INFANT—JUDGMENT—DEFENSE BY PARENTS—GUARDIAN.—The Supreme Court of Massachusetts, in Johnson v. Waterhouse, 26 N. E. Rep. 234, decide that the fact that parents of an infant were present in court with counsel and defended on his behalf, will not make the judgment binding on him, if he had no legally appointed guardian, or guardian *ad litem*. Allen, J., says:

The general rule is well established that a judgment cannot properly be rendered against an infant defendant in a civil suit, unless he has a guardian who may defend the suit in his behalf, and, if a judgment is so rendered, the infant is entitled to maintain a writ of error to avoid the same. Crockett v. Drew, 5 Gray, 399; Swan v. Horton, 14 Gray, 179; Farris v. Richardson, 6 Allen, 118; Mansur v. Pratt, 101 Mass. 60; Cassier's Case, 139 Mass. 458, 1 N. E. Rep. 920. In the present case, the plea which is demurred to avers that the plaintiff in error was an infant at the time of the rendition of the judgment, and had no probate guardian, or legally appointed guardian *ad litem*, but was in fact represented and defended in the action by his father and mother, who were present in court at the trial, and were represented by counsel, and defended the action on his behalf. The defendant in error contends that these facts will supply the want of a guardian regularly and formally appointed, and that, under these circumstances, the infant is not entitled to maintain his writ of error. Such appears to be the rule adopted in Vermont. Priest v. Hamilton, 2 Tyler, 50; Wrisley v. Kenyon, 28 Vt. 5; Fuller v. Smith, 49 Vt. 253. The case cited from Mississippi does not appear to us to go so far, as there a husband was authorized by statute to appear for his infant wife, so that no guardian *ad litem* for her was deemed necessary. Frisby v. Harrisson, 30 Miss. 452. No other decision has been cited by counsel which goes so far as the Vermont cases, and, after some examination, we have found none. The practice of having a regularly appointed guardian rests on good reasons. It has been said that the duty of watching over the interests of infants in a litigation devolves, in a considerable degree, upon the court. Bank v. Ritchie, 8 Pet. 128, 144. This duty is performed, in the first instance, by seeing that an infant is represented by a guardian who is suitable to protect his interest in the particular case. The father is usually a proper person to act as such guardian; but not always. There is an obvious advantage in having the fitness of the person who is to act as guardian determined in the first instance, rather than after the trial is over. It was held in Brown v. Severson, 12 Heisk. 381, that where an infant's mother, who was named as his guardian in his father's will had appeared in a suit as his guardian, and answered as such, and had been recognized by the court as guardian, the judgment should not be set aside, though no formal appointment as guardian appeared of record. In the case now before us, the infant's parents did not file an answer as his guardians nor assume to act formally as such, and there is nothing to show that the court recognized them as his actual guardians, or acted upon the assumption that they were such. They were simply his parents. It is laid down in Macpherson on Infancy, 353, that no legal right of parentage, or of guardianship, will enable any one to act for the infant without an appointment as guardian. If there is no guardian of an infant defendant the plaintiff must bring the matter to the attention of the court, and see to it that one is appointed. Shipman v. Stevens, 2 Wils. 50; Swan v. Horton, *supra;* Clarke v. Gilmanton, 12 N. H. 515; Mason v. Denison, 15 Wend. 64, 67. In Letcher v. Letcher, 2 A. K. Marsh. 158, the mother of infant defendants, who was also herself a defendant, answered for them as their guardian; but she did not appear to have been appointed to defend for them, and the judgment against them was reversed. See also, Irons v. Crist, 3 A. K. Marsh. 143; Searcey v. Morgan, 4 Bibb, 36; Pond v. Donegby, 18 B. Mon. 558. In Swain v. Insurance Co., 54 Pa. St, 455, an attorney appeared for an infant at the instance of his mother; but this was held to be insufficient. In Colman v. Northcote, 2 Hare, 147, Vice-Chancellor Wigram refused to receive the answer, in equity, of a married woman, who was an infant, either separately or jointly with her husband, until a guardian should have been assigned to her. The fact that there are adult defendants joined with an infant defendant, and that all appear by the same attorney, will not avail to prevent the infant from obtaining a reversal of the judgment. Goodridge v. Ross, 6 Metc. (Mass.) 487; Castledine v. Mundy, 4 Barn. &Adol. 90; Foxwist v. Tremaine, 2 Saund. 212*a* note 4. The father of an infant soldier is not entitled to his bounty money, nor to money paid for his enlisting as a substitute in the army. Banks v. Conant, 14 Allen, 497; Kelly v. Sprout, 97 Mass. 169; Taylor v. Bank, Id. 345. Nor has a father, as such, a right to demand and receive a legacy to his infant child. Miles v. Boyden, 3 Pick. 213, 218; Genet v. Tallmadge, 1 Johns. Ch. 3. When an infant sues by *prochein ami* in theory of law the *prochein ami* is appointed by the court, and his authority to act may be revoked by the court. Guild v. Cranston, 8 Cush. 506. It seems to us that it is more in accordance with the general current of decisions, and with sound principles, to hold that the facts stated are insufficient to show that the plaintiff in error is bound by the judgment rendered against him.

CONTRACTS—RESTRAINT OF TRADE—VALIDITY.—The case of National Ben. Co. v. Union Hospital Co., 47 N. W. Rep. 806, decided by the Supreme Court of Minnesota, should be read in connection with the Michigan case—Western Wooden Ware Ass'n v. Starkey—recently published in full with note in Cent. L. J., current volume, p. 186. In the first men-

tioned case, it appeared that two companies were engaged in the business of issuing "benefit certificates" entitling the holders, in case of sickness or injury, to maintenance, care, and medical treatment in any hospital provided by the company. The plaintiff had established a lucrative business of this kind in the States, among others of Minnesota, Wisconsin, and the northern peninsula of Michigan, and had acquired valuable contracts with hospitals in that territory entitling the holder of its certificates to treatment in such hospitals. The two companies entered into a contract, by the terms of which the plaintiff agreed to refrain for the term of three years from selling certificates in the territory named, except to railroad employees, and to turn over, as far as in its power, to the defendant its hospital contracts, in consideration of which the defendant agreed to pay plaintiff a certain sum of money, and also to refrain, for a like period of three years, from selling certificates to railroad employees within the territory referred to. It was held that the contract was not void as being in restraint of trade. Mitchell, J., says:

We feel safe in asserting that no modern decision can be found holding any such contract, under a similar state of facts, void because in restraint of trade. Formerly in England the courts frowned with great severity upon every contract of this kind. The reasons for this partly grew out of the English law of apprenticeship, by which, in its original severity, no person could exercise any regular trade or handicraft except after having served a long apprenticeship. Hence, if a person was prevented from pursuing his particular trade, he was practically deprived of all means of earning a livelihood, and the State was deprived of his services. No such reason now obtains in this country, where every citizen is at liberty to change his occupation at will. Moreover, as cheaper and more rapid facilities for travel and transportation gradually changed the manner of doing business, so as to enable parties to conduct it over a vastly greater territory than formerly, the courts were necessarily compelled to readjust the test or standard of the reasonableness of restrictions as to place. And again, modern investigations have much modified the views of courts as well as political economists as to the effect of contracts tending to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common-law doctrine in regard to contracts in restraint of trade largely grew out of a state of society and of business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions—both English and American. A contract may be illegal on grounds of public policy because in restraint of trade, but it is of paramount public policy not lightly to interfere with freedom of contract. It is unnecessary at this time to go over ground so often traveled by others, and enter into any extended consideration of the decisions on this branch of the law. The principal cases on the subject, from the Year Books down, will be found collated in 2 Parsons on Contracts, 748, and also in the notes to Mitchel v. Reynolds, 1 Smith, Lead. Cas. (9th Ed.) 694. See also, Alger v. Thacher, 19 Pick. 51; Match Co. v. Reober, 106 N. Y. 473, 13 N. E. Rep. 419; Beal v. Chase, 31 Mich. 490; and Navigation Co. v. Winsor, 20 Wall. 64.

The general *concensus* of all the authorities, at least the later ones, is that there is no hard and fast rule as to what contracts are void as being in restraint of trade, but each case must be judged according to its own facts and circumstances; that a party may legally purchase the business and trade of another for the very purpose of removing or preventing competition, coupled with an undertaking on the part of the seller not to carry on the same business in the same place or within the same territory; and the question of the reasonableness of the restraint of trade depends upon whether it is such only as to afford a fair protection of the party in whose favor it is made; and the limits of restraint as to space depend upon the kind of trade or business which is the subject of contract. Tested by these rules we find nothing legally objectionable in the contract under consideration. In addition to cases cited above, see, also, Moore & H. Hardware Co. v. Towers Hardware Co., 6 South. Rep. 41. There are two classes of cases, some of which appellant has cited, which are often confounded with, but are clearly distinguishable from, cases like the present and stand upon an entirely different footing. The one is combinations between producers or dealers to limit the production or supply of an article so as to acquire a monopoly of it and then unreasonably enhance prices. The other is where a corporation of a *quasi* public character charged with a public duty, as a railway company, gas company, or the like enters into a contract restrictive of its business which would disable it from performing its duty to the public. Neither of these elements enters into this case.

CRIMINAL LAW—BLACK-MAILING— INDICTMENT — INTENT. —Some of the ingredients which enter into the crime of black-mailing are stated by the Supreme Court of Ohio, in Mann v. State, 26 N. E. Rep. 226. It was there held that a demand made by the owner upon the offender for a reasonable compensation for property criminally destroyed by the latter, the owner at the time accusing him of the crime, and threatening to prosecute him therefor if the demand is not complied with, does not come within the provisions of section 6830 of the Revised Statutes. Where one is indicted for accusing or threatening to accuse another of a crime punishable by law, with intent to extort or gain from him money or other valuable thing, the truth of the accusation may be material for the defense, in determining the intent with which the defendant made the accusation. Dickman, J., after stating the proper averments of an indictment for this offense, says:

An honest effort on the part of a creditor to collect

a just debt, by accusing or threating to accuse the debtor of a crime with which the debt is connected, or out of which it arose, does not, in our opinion, come within the purview of the statute; nor should the statute be construed as covering the case of an owner who demands from the offender a reasonable compensation for property which he has maliciously and criminally destroyed, and accompanies his demand with a threat to accuse the offender of the crime. In State v. Hammond, 80 Ind. 80, there was an information against the defendant for sending with the intent to extort, a written communication to one Wintroad demanding from him payment of a certain sum of money, and thereby accusing, and threatening to accuse, him of the crime of having obtained the money from the defendant through false pretenses. It was fairly inferable from the letter sent by the defendant to Wintroad, that the latter was indebted to him for the money mentioned and that the object of the defendant was merely to obtain or secure the repayment of it. The court was of opinion that a threat to prosecute for an alleged or supposed offense connected with the creation of the debt, where the object of the threat was merely to secure the payment of the debt due from the person threatened to the person making the threat, did not come within the spirit or purpose of the statute. In People v. Griffin, 2 Barb., 427, the defendant was indicted for having written letters to one Heath, threatening to burn and destroy his property, unless he would within a certain time, send the defendant a given sum of money, claimed by the defendant to be due from Heath. It was not a case in which the debt claimed was connected with or grew out of the act of injury threatened, and Welles, J., in the opinion said: "The intent must be to extort or gain. Can it be truly said that a person extorts money which is justly his due? The word 'gain,' in the connection here used, I regard as synonymous with 'extort.' At least, I think it must mean something more than merely to obtain or get possession of. In view of the well-established rule that penal statutes are to receive a strict construction, I must interpret this as intending to embrace only cases where the intent is to obtain that which, in justice and equity, the party is not entitled to receive."

Whether the accusation against Brigham and his wife was true or false was not, in our judgment, immaterial, as affecting the guilt or innocence of the plaintiff in error. In the absence of any intent to extort or gain, he would not be guilty of the offense charged. It is conceded that the animals poisoned and killed were his property, and if the minds of the jury had not been diverted from a consideration of the evidence, as immaterial, which tended to prove that the parties accused were guilty of the crime of administering the poison, it might have been made manifest to the jury that the motive of the defendant was not to extort or gain, but only to obtain an equitable satisfaction for the loss of his property. In Reg v. Richards, 11 Cox Crim. Cas. 43, it was held that whether the prosecutor was guilty or innocent of the threatened accusation might be material in considering the question whether, under the circumstances of the case, the intention of the prisoner was to extort money or to compound a felony—a distinct statutory offense. The intent to extort may indeed exist notwithstanding the truth of the accusation, and yet, in the light of surrounding circumstances, the fact that the accusation is true may strongly aid in negativing such intent. In Elliott v. State, 36 Ohio St. 318, the charge against Elliott was that, with the intent to extort and gain a certain amount of money, and certain valuable securities, he accused W of the crime of maliciously burning his own barn with the intent thereby to prejudice the insurer. On demurrer to the indictment, it was held that it was not defective for want of an averment that the accusation against W was false. The legal presumption being that the accusation was false, such an averment became unnecessary. The allegation in an indictment of an intent to extort may be sustained, although the accusation threatened be true; hence the propriety of the decision in that case that the truth or falsity of the accusation made by the defendant was not an essential element of the crime. But such decision does not militate with the position that the truth of the accusation may become material not as in itself an adequate defense, but as having a tendency to establish that the intent of the defendant was not to extort, but only to secure a reasonable compensation for property destroyed, or the payment of a just debt.

BILLS OF EXCEPTIONS.

Definition.—A bill of exceptions is a formal statement in writing of the exceptions interposed, and objections taken upon the trial of a cause, to the decisions of the presiding judge on points of law arising during the trial, drawn up by a party seeking a review in a higher court, and properly certified by the trial judge.[1]

History.—Bills of exceptions were unknown to the common law.[2] In the earlier practice, a writ of error might be had whenever there was error apparent on the record, or error in fact, but not for an error in law not appearing on the record. The pleadings were in those days mainly carried on *ore tenus;* so that whenever matter of exception was alleged by either party and overruled by the court, as it was never entered upon the record, it could not be assigned for error.[3] Where, also, objections were made by counsel to the admission or rejection of evidence, or to the judge's charge, no appeal could be had thereon, as such objections were not apparent on record. This defect of procedure constituted a dangerous power in the hands of an ignorant, a corrupt or an arbitrary judge.[4] His misstatements of the law, and his unjust decisions were often not subject to revision, and suitors were entirely without remedy. Even where the motives of the judge were beyond ques-

[1] 1 R. & L. Law Dict., 128; Berly v. Taylor, 5 Hill, 579; 9 Irish Law Times, 385.

[2] Bulkeley v. Butler, 2 Barn. & Cres. 445.

[3] Reeves' Hist. Eng. Law, 97.

[4] Bouv. Inst., § 3232.

tion, injustice might frequently be done through his inadvertance or precipitation. To supply this want in the common law, resort was had to legislation. In the year 1285, the thirteenth of the reign of Edward I, was passed the great statute of Westminster Second. A recent high authority[5] says of this statute: "Every clause has a bearing on the later law. The whole, like the first statute of Westminster, is a code in itself, and justifies the praises of the annalist, who describes it thus: 'Certain statutes the king published very necessary for the whole realm, by which he stirred up the ancient laws that had slumbered through the disturbances of the land: some which had been corrupted by abuse, he recalled to their due form; some which were less evident and clear of interpretation he declared; some new ones useful and honorable he added.'" Among the most important of the "new ones useful and honorable," was that set forth in chapter XXXI, which is the origin in English law of the bill of exceptions. This provision of the statute was in force in England for almost six centuries, and has been substantially adopted in all the States of the American Union. But it was abolished in England by the Judicature Act of 1873.

Exceptions, When Taken.—Exceptions to a decision must be taken at the time it is made.[6] If an objection is made and overruled as to the admission of evidence, and the party does not then take an exception, he is understood to waive it.[7] The usual practice is to request the judge to note down in writing the exceptions, and afterwards, during the session of the court, to hand him the bill of exceptions, and submit it to his correction from his notes. If he is to resort to his memory, it should be handed to him immediately, or in a reasonable time after the trial.[8] In Wright v. Sharp, Chief Justice Holt says: "The statute indeed appoints no time, but the nature and reason of the thing requires the exceptions should be reduced to writing when taken and disallowed; not that they need be drawn up in form, but the substance must be reduced to writing while the thing is transacting, because it is to become a record."[9] In this country the time for tendering a bill of exceptions is regulated by statute; and the limit is usually the end of the term at which the cause was tried.[10] But the exceptions must be taken at the trial. In the words of Chief Justice Waite: "The theory of a bill of exceptions is that it states what occurred while the trial was going on. Time is usually given to put what was done into appropriate form for the record; but unless objection was made and exception taken before the verdict, no case is presented for review here of the rulings at the trial."[11]

Contents.—A bill of exceptions ought to be upon some point of law, either in admitting or denying evidence, or a challenge or upon the charge of the court, or some matter of law arising upon a fact not denied, in which either party has been overruled by the court.[12] It was not originally intended to draw the whole matter into examination again, but only a single point;[13] it was necessary to include only so much of the evidence as was requisite to show that the judge erred in his ruling upon the point; and not only that he erred, but that the error was prejudicial to the party taking the exception.[14] This is still the practice insisted upon by the United States Supreme Court, which has repeatedly condemned the bringing of the whole of the judge's charge, and the setting forth *in extenso* the evidence given in the court below.[15] But many of the State supreme courts require that the bill of exceptions should contain all the evidence given or offered at the trial, as well as an averment that such evidence is the whole,[16] else it will be presumed

[5] Stubbs' Const. Hist. of Eng., II, 117.

[6] Nagel v. Guittar, 62 Ia. 510; Borah v. Martin, 2 Pin. 401.

[7] Poole v. Fleeger, 11 Pet. 185.

[8] Pow. App. Proc. 222; *Ex parte* Martha Bradstreet, 4 Pet. 102.

[9] Wright v. Sharp, 1 Salk. 285; 1 Arch. Pr. 376.

[10] Sweet v. Perkins, 24 Fed. Rep. 777; Sikes v. Rawson, 6 Johns. 297.

[11] Armstrong v. Mock, 17 Ill. 166; Agnew v. Campbell, 2 Harr. 291; Powell v. Tarry, 77 Va. 250; Richardson v. Ship Havre, 4 Fed. Rep. 748; Ry. Co. v. Heck, 102 U. S. 120.

[12] 1 Bac. Abr. 778.

[13] Bridgman v. Holt. Show. Pa. Cas. 120; Wheeler v. Winn, 53 Pa. St. 122.

[14] 1 Arch. Pr. 376; Fuller v. Ruby, 10 Gray, 285; Brewer v. Strong's Ex'rs, 44 Am. Dec. 514; Lincoln v. Claflin, 7 Wall. 132.

[15] Pennock v. Dialogue, 2 Pet. 15; Cawer v. Jackson, 4 Pet. 1.

[16] Ide v. Churchill, 14 Ohio St. 377; Fellenzer v. Van Valzah, 95 Ind. 128; Knowlton v. Culver, 2 Pin. 243; S. C., 52 Am. Dec. 156; Pullen v. Lane, 4 Coldw. (Tenn.) 249.

[17] Pow. App. Proc. 229; Ide v. Churchill, *supra;*

that other evidence was given which justified the decision or ruling of the trial judge.[17] It is not sufficient to state that the bill contains "an outline of all the testimony in the case."[18] And notwithstanding the averment that it contains "all the evidence," yet if on its face there is an apparent omission of evidence, the supreme court will not consider any question which depends for its proper decision upon the evidence in the cause.[19] Where exception is taken to the admission or rejection of evidence, the bill must clearly show its relevancy, or no error will be presumed.[20] A general exception to the ruling of the judge cannot be sustained unless *all* the rulings are erroneous.[21] The bill of exceptions does not reach to irregularities in the proceedings, nor to errors of the jury.[22] Nor is a bill of exceptions necessary where the error of the court is intrinsic, and appears on the face of the record.[23] "The office of a bill of exceptions," says Ryan, C. J., "is to put upon the record what would not otherwise appear upon it; not to correct and vary it. So far, and so far only, for that purpose and for that purpose only, a bill of exceptions becomes a part of the record. Any repetition of the record proper—any statement of what ought to appear by the record proper—any qualification of the record proper is *ultra vires* in a bill of exceptions."[24]

Signing.—It is an essential element in a bill of exceptions that it should be signed and sealed by the judge or court to whose decisions the exceptions are taken.[25] If the statement of facts contained in the bill be true, the judge is in duty bound to sign the bill when it is presented in apt time.[26] The exceptions must be taken at the trial, and noted by the judge. But the bill need not be drawn up in form and signed before the end of the term, and this time may be extended by stipulation of counsel, or by order of court entered on the record.[27] It was formerly held by the United States Supreme Court, that when a bill was presented for signing after the trial, it must be signed *nunc pro tunc*.[28] But Strong, J., in a recent case, says: "There is no rule that a bill of exceptions signed (during the term) after the expiration of the time allowed therefor by rule of court, must in form be signed *nunc pro tunc*."[29] It is no longer necessary in the federal courts that a bill of exceptions should be sealed; mere signing by the judge of the court, or by presiding judge, if more than one sat on the trial, is now a sufficient authentication.[30] If the statement of facts in a bill of exceptions be erroneous, the trial judge may make or suggest corrections, or he may refuse to sign it altogether.[31] But when the exceptions have been certified under the seals of the judges of the circuit court, they cannot be altered or amended by the appellate court.[32] Still, where a bill of exceptions has been fraudulently obtained, or sealed irregularly, improvidently or in clear violation of a plain rule of law, the appellate court will quash it.[33]

Refusal to Sign—Remedy.—If the averments in a bill of exceptions be true, the judge is obliged by the statute to sign it; and two modes of redress are found in the books in case he refuses to do so. According to Coke, Hale, Buller, and some of the early English decisions, the proper remedy is by writ grounded upon the statute, commanding the judge, if the bill be true, to affix his seal *juxta formam statuti*. And should the judge return to this writ that the facts are untruly stated when the case is otherwise, an action may be maintained against him for such his false return.[34] This is the theory adopted by the Supreme Court of Pennsylvania, who hold that mandamus cannot issue to compel a judge to seal a bill of exceptions under the statute of Westminster.[35] But the more generally accepted theory is, that an appellate court has

[18] Buckmaster v. Cool, 12 Ill. 74.
[19] Collins v. Collins, 100 Ind. 266.
[20] Johnson v. Jennings, 10 Gratt. 1; State v. Goodrich, 19 Vt. 116.
[21] Cronk v. Canfield, 31 Barb. 171; Ry. Co. v. Jurey, 111 U. S. 585.
[22] State v. Somerville, 21 Me. 14: s. c., 38 Am. Dec. 248.
[23] Kitchell v. Burgwin, 21 Ill. 45.
[24] Hogan v. State, 36 Wis. 232.
[25] Morse v. Evans, 6 How. Pr. 445; Ins. Co. v. Lanier, 95 U. S. 171.
[26] Pow. App. Proc. 249; Steph. on Pl. 121.
[27] Sweet v. Perkins, 24 Fed. Rep. 777; Sikes v. Ransom, 6 Johns. 297; Hake v. Strubel, 121; Brownfield v. Brownfield, 58 Ill. 152.
[28] Walton v. U. S., 9 Wheat. 657; Turner v. Yates, 16 How. 28; Stanton v. Embrey, 93 U. S. 548.
[29] Hunnicutt v. Peyton, 102 U. S. 333.
[30] Rev. Stat. U. S. § 953; Generes v. Campbell, 11 Wall. 193; Herbert v. Butler, 97 U. S. 319.
[31] Pow. App. Proc. 249; Williams v. Taylor, 6 Bing. Jelly v. Roberts, 50 Ind. 1.
[32] Stinson v. Ry., 3 How. 553.
[33] Wilson v. Moore, 4 Hun. (N. J.) 186.
[34] 2 Coke Inst. 427; Hale Hist. Com. Law, ch. 12, N; Buller N. P. 316; Bridgman v. Holt, Show. Pa. Cos. 111.
[35] Courow v. Schloss, 55 Pa. St. 28.

jurisdiction to grant *mandamus* to compel a judge to sign.[36] However, a distinction is to be observed between the settling and allowance of a bill of exceptions, which is an act judicial in its nature, and the act of signing, which is purely ministerial.[37] The supreme court cannot compel the judge to do an act which rests in his discretion; it is his exclusive province to determine the correctness of a bill which he is requested to sign; and he should sign such a one as he believes to be correct, and none other.[38] If he states in his return to the alternative writ that he has signed such a bill as in his judgment contains a true statement of the facts, the peremptory writ will be refused.[39] But where the judge absolutely refuses to perform his duty, the appellate court, by peremptory mandate, will compel him to sign. And where the trial judge resigned to escape signing a proper bill of exceptions, he was fined for contempt and the bill was taken as true, and given the same effect as if it had been signed and sealed by him.[40]

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Omaha, Neb.

[36] People v. Judges Washington County, 1 Col. 511; People v. Jameson, 40 Ill. 93; s. c., 89 Am. Dec. 387; State v. Hall, 3 Coldw. 255; People v. Van Buren, Circuit Judge, 41 Mich. 725.

[37] Hake v. Strudel, 12 N. E. Rep. 676.

[38] People v. Jameson, 40 Ill. 93.

[39] Jelly v. Roberts, 50 Ind. 1; State v. Noggle, 13 Wis. 380.

[40] People v. Pearson, 3 Scam. (Ill.) 270.

OFFICERS — HEALTH BOARD — STATUTE — KILLING INFECTIOUS ANIMALS — ACTION FOR DAMAGES.

MILLER V. HORTON.

Supreme Judicial Court of Massachusetts, January 1, 1891.

Under St. Mass. 1887, ch. 252, § 13, providing that "in all cases of farcy or glanders the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed without appraisement," the order of the commissioners affords no defense to an action by the owner for compensation against those who executed it, unless the animal killed is in fact infected with farcy or glanders, the statute providing no compensation for healthy animals killed by mistake as diseased ones. Devens, C. Allen and Knowlton, JJ., dissenting.

HOLMES, J.: This is an action of tort for killing the plaintiff's horse. The defendants admit the killing, but justify as members of the board of health of the town of Rehoboth, under an order addressed to the board and signed by two of the three commissioners of contagious diseases among domestic animals, appointed under St. 1885, ch. 378, and acting under the alleged authority of St. 1887, ch. 252, § 13. This order declared that it was adjudged that the horse had the glanders, and that it was condemned, and directed the defendants to cause it to be killed. The judge before whom the case was tried found that the horse had not the glanders, but declined to rule that the defendants had failed to make out their justification, and found for the defendants. The plaintiff excepted.

The language of the material part of section 13 of the act of 1887 is: "In all cases of farcy or glanders the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed without an appraisal, but may pay the owner, or any other person, an equitable sum for the killing and burial thereof." Taken literally, these words only give the commisioners jurisdiction and power to condemn a horse that really has the glanders. The question is whether they go further by implication, so that, if a horse which has not the disease is condemned by the commissioners, their order will protect the man who kills it, in a subsequent suit by the owner for compensation.

The only main ground for reading into the statute an intent to make the commissioners' order an absolute protection is that there is no provision for compensation to the owner in this class of cases, and, therefore, unless, the order is a protection, those who carry it out will do so at their peril. Such a construction, when once known, would be apt to destroy the efficiency of the clause, as few people could be found to carry out orders on these terms.

On the other hand, this same absence of any provision for compensation to the owner, even if not plainly founded on the assumption that only a worthless animal, and a nuisance is in question, still would be equally strong argument for keeping to the literal and narrower interpretation. If the legislature had had in mind the possible destruction of healthy horses, there was no reason in the world why it should not have provided for paying the owners. The twelfth section does provide for paying them in all cases where they are not in fault, unless this is an exception. When, as here, the horse not only is not to be paid for, but may be condemned, without appeal, and killed, without giving the owner a hearing, or even notice, the grounds are very strong for believing that the statute means no more than it says, and is intended to authorize the killing of actually infected horses only. If the commissioners had felt any doubt, they could have had the horse appraised under section 12. Whether an action would have lain in that case, we need not consider.

The reasons for this construction seem decisive to a majority of the court when they consider the grave questions which would arise as to the constitutionality of the clause, if it were construed the other way.

The thirteenth section of the act of 1887, by implication, declares horses with the glanders to be nuisances, and we assume in favor of the defendant that it may do so constitutionally, and may authorize them to be killed without compensation to the owners. But the statute does not declare all horses to be nuisances, and the question is whether, if the owner of the horse denies that his horse falls within the class declared to be so, the legislature can make the *ex parte* decision of a board like this conclusive upon him. That question is answered by the decision in Fisher v. McGirr, 1 Gray, 1. It is decided there that the owner has a right to be heard, and, further, that only a trial by jury satisfies the provision of article 12 of the declaration of rights, that no subject shall be deprived of his property but by the judgment of his peers, or the law of the land.

In Belcher v, Farrar, 8 Allen, 325, 328, it was said that "it would violate one of the fundamental principles of justice to deprive a party absolutely of the free use and enjoyment of his estate under an allegation that the purpose to which it was appropriated, or the mode of its occupation, was injurious to the health and comfort of others, and created a nuisance, without giving the owner an opportunity to appear and disprove the allegation, and protect his property from the restraint to which it was proposed to subject it." See, also, Sawyer v. Board, 125 Mass. 182; Winthrop v. Farrar, 11 Allen, 398.

Of course there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand he may be heard afterwards. The statute may provide for paying him in case it should appear that his property was not what the legislature has declared to be a nuisance, and may give him his hearing in that way. If it does not do so the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them.

An illustration, although not strictly an instance of the former mode, may be found in the statute authorizing firemen or engineers of fire departments to order houses to be pulled down in order to prevent the spreading of a fire, and making the town answerable to the house owner except in certain cases in which the house is practically worthless because it would have burned if it had not been destroyed. Pub. St. ch. 35, §§ 3–5. No doubt the order would be conclusive in its legislative capacity or "so far as the *res* is concerned," as said in Salem v. Railroad Co., 98 Mass. 431, 449; that is to say, that the house should be pulled down. But the owner is preserved his right to a hearing in a subsequent proceeding for compensation. On the other hand, a case where a party proceeds at his peril is when he pulls down a house for the same object without the authority of statute. It is said that if the destruction is necessary, he is not liable. But by the common law as understood in this commonwealth, "if there be no necessity, then the individual who did the act shall be responsible." Shaw, C. J., in Taylor v. Plymouth, 8 Metc. (Mass.) 462, 465; Philadelphia v. Scott, 81 Pa. St. 80, 87. See Mitchell v. Harmony, 13 How. 115, 134, 135. This means that the determination of the individual is subject to revision by a jury in an action, and is not conclusive on the owner of the house.

So Blair v. Forehand, 100 Mass. 136, where it was held that a statute might constitutionally authorize the killing of unlicensed dogs as nuisances, it was assumed that the question whether the particular dog killed was unlicensed was open in an action against the officer who killed it, and that if he killed a licensed dog he would be liable in tort; in other words, that he proceeded in that respect at his own risk. Page 143, citing Shaw, C. J., in Tower v. Tower, 18 Pick. 262. It could have made no difference in that case if a board of three had been required to decide *ex parte* beforehand whether the dog was licensed.

In Salem v. Railroad Co., 98 Mass. 431, it was decided, in agreement with the views which we have expressed, that the decision of board of health that a nuisance existed on certain premises, and the order of the board that it be removed at the expense of the owner, were not conclusive upon the owner in a subsequent action against him to recover the expense, he having had no notice or opportunity to be heard. The general rule is that a judgment *in rem*, even when rendered by a regularly constituted court, after the fullest and most formal trial, is not conclusive of the facts on which it proceeds against persons not entitled to be heard and not heard in fact, although it does change or establish the *status* it deals with as against all the world from the necessities of the case, and frequently by express legislation. Brigham v. Fayerweather, 140 Mass. 411, 413, 5 N. E. Rep. 265.

It is true that it is said in Salem v. Railroad Co., that the board's determination of questions of discretion and judgment in the discharge of their duties would protect all those employed to carry such determinations into effect. The remark is *obiter*, and it is doubtful perhaps on reading the whole case whether it means that the determination would protect them in an action for damages when the statute provided no compensation for property taken which is not a nuisance. To give it such an effect as a judgment merely, would be inconsistent with the point decided, and with Brigham v. Fayerweather. We are not prepared to admit that a condemnation by the present board under section 13 could be made conclusive of the fact that the plaintiff's horse had the glanders, in the present action. See further, Holcomb v. Moore, 4 Allen, 529; Foley v. Haverhill, 144 Mass. 352, 354, 11 N. E. Rep. 554.

But we are led by the *dictum* in Salem v. Rail-

road Co. to consider another possible suggestion. It may be said, suppose that the decision of the board is not conclusive that the plaintiff's horse had the glanders, still the legislature may consider that self-protection requires the immediate killing of all horses which a competent board deem infected, whether they are so or not, and, if so, the innocent horses that are killed are a sacrifice to necessary self-protection, and need not be paid for.

In Train v. Disinfecting Co., 144 Mass. 523, it was held that all imported rags might be put through a disinfecting process at the expense of the owner. Of course, the order did not mean that the legislature or board of health declared all imported rags to be infected, but simply that the danger was too great to risk an attempt at discrimination. If the legislature could throw the burden on owners of innocent rags in that case, why could it not throw the burden on the owners of innocent horses in this? If it could order all rags to be disinfected, why might it not have ordered such rags to be disinfected, as a board of three should determine summarily, and without notice or appeal? The latter provision would have been more favorable to owners, as they would have had a chance at least of escaping the burden, and it would stand on the same ground as the severer law.

The answer, or a part of it, is this: Whether the motives of the legislature are the same or not in the two cases supposed, it declares different things to be dangerous and nuisances unless disinfected. In the one, it declares all imported rags to be so; in the other, only all infected rags. Within limits, it may thus enlarge or diminish the number of things to be deemed nuisances by the law, and courts cannot inquire why it inconcludes certain property, and whether the motive was to avoid an investigation. But wherever it draws the line, an owner has a right to a hearing on the question whether his property falls within it and this right is not destroyed by the fact that the line might have been drawn so differently as unquestionably to include that property. Thus, in the first case, the owner has a right to try the question whether his rags were imported; in the second, whether they were infected. His right is no more met in the second case by the fact that the legislature might have made the inquiry immaterial by requiring all imported rags to be disinfected, than it would be in the first by the suggestion that possibly the legislature might require all rags to be put through the same process whether imported or not. But if the property is admitted to fall within the line, there is nothing to try, if the line drawn is a valid one under the police power. All that Train v. Disinfecting Co. decided was that the line there considered was a valid one.

Still it may be said, if self-protection required the act, why should not the owner bear the loss? It may be answered that self-protection does not require all that is believed to be necessary to that end, nor even all that is reasonably believed to be necessary to that end. It only requires what is actually necessary. It would seem doubtful at least whether actual necessity ought not to be the limitation when the question arises under the constitution between the public and an individual. Such seems to be the law as between private parties in this commonwealth in the case of fires, as we have seen. It could not be assumed as a general principle without discussion that even necessity would exonerate a party from civil liability for a loss inflicted kowingly upon an innocent person who neither by his person nor his property threatens any harm to the defendant It has been thought by great lawyers that a man cannot shift his misfortunes upon his neighbor's shoulders in that way when it is a question of damages, although his act may be one for which he would not be punished. Gilbert v. Stone, Aleyn, 35, Style, 72; Scott v. Shepard, 2 W. Bl. 892, 896. Upon this we express no opinion. It is enough to say that in this case actual necessity only required the destruction of infected horses, and that was all that the legislature purported to authorize.

Again, there is a pretty important difference of degree, at least (Rideout v. Knox, 148 Mass. 368, 372, 19 N. E. Rep. 390), between regulating the precautions to be taken in keeping property, especially property sought to be brought into the State, and ordering its destruction. We cannot admit that the legislature has an unlimited right to destroy property without compensation, on the ground that destruction is not an appropriation to public use within article 10 of the declaration of rights. When a healthy horse is killed by a public officer, acting under a general statute for fear that it should spread disease, the horse certainly would seem to be taken for public use as truly as if it were seized to drag an artillery wagon. The public equally appropriates it, whatever they do with it afterwards. Certainly the legislature could not declare all cattle to be nuisances, and order them to be killed without compensation. Watertown v. Mayo, 109 Mass. 315, 319; *In re* Jacobs, 98 N. Y. 98, 109. It does not attempt to do so. As we have said, it only declares certain diseased animals to be nuisances. And even if we assume that it could authorize some trifling amount of innocent property to be destroyed as a necessary means to the abatement of a nuisance, still, if in this section 13 it had added in terms that such healthy animals as should be killed by mistake for diseased ones should not be paid for, we should deem it a serious question whether such a provision could be upheld. See, further, Hutton v. Camden, 39 N. J. Law, 122; Hale v. Lawrence, 21 N. J. Law, 714; Grant v. U. S., 1 Ct. Cl. 41; Wiggins v. U. S., 3 Ct. Cl. 412; Mitchell v. Harmony, 13 How. 115, 134.

For these reasons, the literal, and as we think, the true, construction of section 13 seems to us the only safe one to adopt, and accordingly we

are of opinion that the authority and jurisdiction of the commissioners to condemn the plaintiff's horse under section 13 was conditional upon its actually having the glanders. If this be so, their order would not protect the defendants in a case where the commissioners acted outside their jurisdiction. Fisher v. McGirr, 1 Gray, 1, 45. The fact as to the horse having the disease was open to investigation in the present action, and, on the finding that it did not have it, the plaintiff was entitled to a ruling that the defendants had failed to make out their justification.

In view of our conclusion upon the main question, we have not considered whether an order signed by two members of the board, upon an examination by one, satisfies the statute, or whether cases like Ruggles v. Nantucket, 11 Cush. 433, and Parsons v. Pettingill, 11 Allen, 507, apply.

Exceptions sustained.

NOTE.—The fact that three of the judges of the court dissented from the conclusion of the majority in the above case is indicative of the exceeding nicety of the question involved, and of the difficulties in its solution. It will be noted that the construction of the statute as made by a majority of the court, is a narrow and restrictive one. It proceeds upon the natural supposition that the legislature could not have intended the destruction or killing of healthy horses not subject to the disease of glanders or farcy, and that a broader construction which gives to the commissioners absolute power and authority to destroy or kill healthy horses without compensation to the owner, or at least without hearing in court, would render the statute unconstitutional as a taking of private property without due process of law.

The argument of the dissenting judges proceeds also upon the hypothesis that the legislature did not intend to confer upon the board of commissioners express power to kill healthy horses not subject to the above diseases. In other words, it must be admitted by both sides, that a statute which in terms gives power to destroy healthy animals would be clearly unconstitutional. See Village v. Poyer (Ill.), 26 Cent. L. J. 363, where an ordinance declaring picnic or amusement grounds to be a nuisance, was held unconstitutional. But the position is taken by the opponent of the view of the court, that the act is constitutional as giving power to the board to kill diseased animals, though in the determination of this question it may happen, as in this case, that by mistake healthy animals are killed, and therefore that the broad construction does not render the statute unconstitutional. Upon the subject of the constitutionality of the act, it is contended that laws passed in the lawful exercise of the police power are not made unconstitutional because no provision is made for compensation to the individual whose property may be affected thereby. They are passed for the protection of the community against the ravages of fire, the spreading of pestilence, and the prevention of other serious calamities, and such property is not taken for any use by the public within the meaning of the constitution. The regulations in regard to quarantine, health, fire, and the laws for the abatement of existing and prevention of threatened nuisances, are instances of the exercise of this power. Bancroft v. Cambridge, 126 Mass. 438, and authorities. Their validity rests upon the necessity of providing for the public safety, and the individual is presumed to be compensated by the benefit which such regulations confer upon the community of which he is a member, or by which his property is protected. It is for the legislature ordinarily to determine how, when and through whom this police power is to be exercised, and all rights of property are held subject to such reasonable control as it may deem necessary for the prevention of injury to the rights of others, or for the protection of public health and welfare. "In the exercise of this power," says Mr. Justice Gray, "the legislature may not only provide that certain kinds of property (either absolutely, or when held in such manner or under such circumstances as to be injurious, dangerous or noxious) may be seized and confiscated upon legal process after notice and hearing, but may also, when necessary to insure the public safety, authorize them to be summarily destroyed without previous notice to the owner, as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration, or the impending fall of the buildings themselves, throwing overboard decaying or infected food, or abating other nuisances dangerous to health." Blair v. Forehand, 100 Mass. 136, and authorities.

In the case at bar, the animal was killed after an adjudication by the cattle commissioners, by which it was determined that he was affected with the contagious disease known as the "glanders," and, no provision having been made by the law for payment to the owner in such case, it is contended that the law is wholly unconstitutional; and, further, that, even if it should be held constitutional, so far as it relates to animals actually tainted with this disease, the plaintiff is entitled to show as against these defendants that the animal was not so tainted, and to recover from them the value of the animal by reason of the fact that they executed the order of the commissioners. The contention that the law is unconstitutional, so far as animals actually tainted are concerned, cannot be maintained unless it is true that every police regulation affecting the use of property, or authorizing the destruction of property as dangerous to the community, is unconstitutional except when it provides for payment to the owner. The law was a police regulation, the adjudication was made by a tribunal acting semi-judicially, of the same general character as the board of health, to whom large powers have always been confided for the abatement of nuisances and the protection of the public health. It was for the legislature to determine a particular disease was such that the existence of the animal would be dangerous to public health, and the authorities are numerous and decisive that for injuries to or diminution of value of property, by reason of the operation of a police regulation, the owner is not entitled to demand compensation. Chase v. Ingalls, 97 Mass. 529; Bergin v. Hayward, 102 Mass. 414; Salem v. Railroad Co., 98 Mass. 431; Taunton v. Taylor, 116 Mass. 255; Baker v. Boston, 12 Pick. 184; Belcher v. Farrar, 8 Allen, 325.

The statute, therefore, according to the minority of the court, being constitutional upon either the narrow or the broad construction given it, to the further contention that the plaintiff is entitled to show as against the commissioners that the animal in question was a healthy one, and to recover from them its value, it is said that it would perhaps be sufficient that the defendants acted by direction of a body to whom the legislature lawfully could and did confide the power of deciding whether the animal in question was affected with disease; and that in the execution of the decree of a tribunal which was competent to deal with the subject, its officers cannot be made responsible for

any error committed in its adjudication. But the position is taken that the decision of the commissioners is conclusive, and can lawfully be made conclusive by the legislature. Upon this question it is said that the most frequent application of the police power is in the abatement of nuisances by boards of health and similar tribunals, and it cannot make any material difference that in those cases property is not always destroyed, and that more frequently the cases are those in which its uses are limited or particular uses forbidden. The case of Salem v. Railroad Co., 98 Mass. 431, is cited as establishing the proposition that in the abatement of nuisances an action of the board of health was valid without notice to the parties interested, or opportunity for them to be heard, and that powers to determine whether objects should be removed or destroyed are undoubtedly very high powers, but they must of necessity be confided to boards of administration in order that the public safety may be guarded. Although of a *quasi* judicial nature, they must be exercised even without the delays which necessarily attend formal notices and formal trials; and where adjudications are fairly and honestly made, even if mistakes may sometimes occur, they should be held conclusive so far as the *res* with which they deal is concerned. "Their determination," says Mr. Justice Wells, in the above case, "of questions of discretion and judgment in the discharge of their duties is undoubtedly in the nature of a judicial decision, and within the scope of the power conferred, and for the purposes for which the determination is required to be made, it is conclusive. It is not to be impeached or set aside for error or mistake of judgment, nor to be reviewed in the light of new or additional facts. The officers or board to whom such determination is confided, and all those employed to carry it into effect, or who may have occasion to act upon it, are protected by it, and may safely rely upon its validity for their defense."

If the legislature may declare all imported rags to be nuisances, as in Train v. Disinfecting Co., 144 Mass. 523, or cause them to be disinfected, subjecting the owner to the expense of the operation, although it might be held by a jury thereafter that they were not infected, it would seem that it might make such declaration in regard to all rags which a respectable board deem to be infected, even if in fact not infected. It may determine when that which is otherwise property may cease to be such. It is not competent for the keeper of intoxicating liquors, kept for sale contrary to law, to show that this keeping is not in fact a nuisance, when the legislature has declared it to be one. Rights of property are not indeed to be invaded wantonly. If it can be seen that an order or regulation is not intended for the protection of the public health, the prevention of nuisances, the preservation of public order, and that these are not its real objects, courts should interfere for the protection of the citizen in his property.

Applying the principles to the case at bar, it is claimed that they are decisive. The legislature has decided that a horse infected with glanders is so dangerous to the public health, whether of other valuable domestic animals or of man, that it should be destroyed on account of its dangerous character, and should cease to be entitled to the usual protection of property. It is not an objection to this law, that it has failed to provide compensation to the owner, as the animal is itself, in its view, a nuisance of serious danger to the community. It has empowered a respectable tribunal with powers similar to those of a board of health, to determine whether an animal is of the class described in the statute. The exigency of the case does not permit, at least in the opinion of the legislature, of notice, appeal or other modes of reviewing the decision of such a tribunal. This appears to be a lawful exercise of the police power, and the decision should be held conclusive in order that the community may be protected, and that those intrusted with the execution of the law may safely assume the responsibilities imposed upon them.

The case of Raymond v. Fish, 51 Conn. 80, is one which might have been cited by the dissenting judges to sustain their view, and goes further in the direction of exempting health officers from civil liability for official acts, than any to be found. The Connecticut statute, with regard to public health, provides that the board of health in every town shall have "all the power necessary and proper for preserving the public health and preventing the spread of malignant diseases," and that it shall be their duty "to examine into all nuisances and sources of filth injurious to the public health, and cause to be removed all filth found within the town which, in their judgment, shall endanger the health of the inhabitants." It was held in the above case, that the members of the board of health, where acting in good faith and with reasonable caution, were not liable for an error of judgment in causing the removal as a nuisance of property which they believed to be the cause of the prevalence of a malignant disease, though it thereafter appeared that such was not the fact.

Quasi judicial officers are as a general rule exempt from civil liability for official acts. Like judicial officers, where the rule in question is without qualification, *quasi* judicial officers cannot, as a general proposition, be called upon to respond in damages to the private individual for the honest exercise of his judgment within his jurisdiction, however erroneous or misguided his judgment may be. Mechem on Public Offices and Officers, sec. 638; Wall v. Trumbull, 16 Mich. 228; Jenkins v. Waldron, 11 Johns. (N. Y.) 114; Henderson v. Smith, 26 W. Va. 829.

As noted in the Connecticut case, this rule extends to boards of health in examining and deciding upon nuisances and the source of disease. Salem v. Railroad Co., 98 Mass. 431. But in order to render the *quasi* judicial officer exempt, he must, like the judicial officer, keep within the limits fixed by law of his jurisdiction. For if he exceeds it, except as a result of a mistake of fact, he will be liable to the party injured. Freeman v. Kenney, 15 Pick. 44; Gage v. Currier, 4 Pick. 399; Hays v. Steamship Co., 17 How. (U. S.) 596; Williams v. Weaver, 75 N. Y. 30. But inasmuch as the law quite universally protects private property from appropriation to the public use without compensation, the judgment or discretion of the *quasi* judicial officer, though exercised honestly and in good faith, will not protect him where, by virtue of it, he undertakes to invade the private property rights of others to whom no other redress is given than an action against the officer. Mechem on Public Offices and Officers, sec. 642; McCord v. High, 24 Iowa, 336; Ashley v. Port Huron, 35 Mich. 296; Cubit v. O'Dett, 51 Mich. 347; Tierney v. Smith, 86 Ill. 391.

In the Iowa case, Dillon, C. J., says: "Where a public officer, other than a judicial one, does an act directly invasive of the private rights of others, and there is otherwise no remedy for the injury, such officer is personally liable without proof of malice and an intent to injure." Reviewing the arguments and authorities upon both sides of this question, the con-

clusion of the majority of the court seems best warranted. First, because a construction of the statute giving express or implied power to the commissioners to kill healthy animals would render it unconstitutional. Second, not having such power, the commissioners are liable for the result of their acts, which in one point of view may be said to be without their statutory jurisdiction, and which in any point of view takes private property from its owner without due process of law.

CORRESPONDENCE.

DISSEISIN BY MISTAKE.

To the Editor of the Central Law Journal:

Under "Correspondence" in your journal of Feb. 27, appeared a stricture by D. J. Cable, of Lima, Ohio, upon an article written by me and published in your journal of Feb. 13. As to the alleged failure to notice decisions adverse to the position taken in that article, that disseisin could not be committed by mistake, this seems to be a criticism springing more from the fault of the critic in not carefully examining the article, than from any oversight in the author. Note 14 of that article expressly calls attention to this conflict of authority, and several cases are there cited illustrative of it, among which is the leading case in Connecticut, which case is taken as the foundation of the opinion quoted in the criticism.

The object of that article was not an exhaustive citation of all the authorities that might be found *pro* and *con*, which would have swelled the foot notes out of all proportion to the text, but merely an orderly statement of the general doctrines relating to the subject, with a citation of those authorities which most clearly stated or illustrated those principles. Conflict of authority was called attention to in the notes.

The cases of Yetzer v. Thoman, 17 Ohio St. 130, referred to, and of French v. Pearce, 8 Conn. 439, the reasoning and language of which was adopted by the former, are misunderstood, if it is supposed that they intended to deny that intent to claim adversely was a necessary element of disseisin. The doctrine of intent is expressly adhered to. In French v. Pearce, Hosmer, C. J., after referring to the opinion in Brown v. Gay, 3 Greenl. 126, says: "I agree with the learned court, that the intention of the possessor to claim adversely is an essential ingredient."

The refusal of the court in those cases to examine the "*motives or purposes*" of the disseisor is quite different from denying the necessity of *intent*. Such a conclusion would ignore the now well recognized distinction between motive and intent. Those cases may well proceed upon the theory that, though intent to claim adversely is essential, yet the motive that prompts such claim, or the purposes for which it is made, are immaterial.

When a fence has by mistake been extended beyond the true line, does an occupancy of such land, under the supposition that the fence extends only to the true line, constitute adverse possession? The true question is, supposing intent to claim adversely is essential, does this state of facts constitute such adverse claim? The cases in question hold that it does. The same judge, immediately after the quotation above, proceeds to say: "But the person who enters upon land, believing and claiming it to be his own, does thus enter and possess. The very nature of the act is an assertion of his own title and the denial of the title of all others."

This seems to be the real point of divergence from the general doctrine, and it was to point out this divergence that French v. Pearce was cited in the note. That this doctrine is "based upon a better reason and a better authority" is by no means conceded. I hope, in the future, to present a view of that question in a separate article.

A. HOLLINGSWORTH.

Keokuk, Iowa, March 6, 1891.

RECENT PUBLICATIONS.

THE GAST-PAUL DIRECTORY of Bankers and Attorneys, and Digest of the Laws. January, 1891. Edition. St. Louis, U. S. A.: Twenty-first and Morgan streets; New York: 9, 11 and 13 Destrosus street; Glasgow: 115 St. Vincent street.

Aside from its excellent legal department, which we will refer to hereafter, this directory is the most complete, and contains more bank addresses than any other Bankers' Directory published on the globe. It not only contains a full list of the banks and bankers of the United States, with the amount of their capital and surplus, names of their officers and principal correspondents, but in addition to this, it gives a full list of the Canadian banks, with like information concerning each, and still further, a list of the banks and bankers of Europe. No other directory of similar character, published either in America or Great Britain, contains these lists in such excellent form and completeness. The list of villages accessible to banking towns throughout the United States is particularly full and complete. Following this is a list of attorneys throughout the United States, Canada and Great Britain, recommended by banks and bankers. These attorneys are actually recommended by banks and bankers to the publishers as is represented, and appended to the name of each attorney, is the name of the bank or banker by whom such attorney has been indorsed, as a reliable practitioner and trustworthy correspondent. It is a well known fact that the department of justice has not published anything approaching a revised register since 1886. In this directory we find corrected to January 1st, lists showing the officers of the United States courts, United States courts districts by counties, the times and places of holding courts, and a full list of the United States commissioners; and in connection therewith a synopsis of the laws of the United States governing practice in the federal courts. Following this are the digests of State and territorial laws, covering upwards of three hundred pages of fine print. The whole makes a volume of over eight hundred compactly printed pages, and a book which should be in the library of every practicing lawyer.

KERR'S LAW OF BUSINESS CORPORATIONS.

This book, though founded primarily upon New York statute law, is not by any means confined to the narrow limits of the acts of that State. The author says that his object has been "to make the volume a convenient manual wherein the busy attorney may find an exhaustive collection of the cases upon the organization and management of business corporations; their powers and obligations; their rights and privileges; their assessment and taxation; their dissolution and winding up, and receivers for and judicial control thereof, and the like." The book does not pretend to be, nor is it a treatise upon the common law doctrines pertaining to corporations, except as modified or changed by statute. In other words, it is

a compendium of the statutes of some of the leading eastern States, on the subject of corporation law, accompanied by the decisions of the different courts of the United States wherein such statutes or similar ones have been construed. Although the treatise is largely for New York use, and therefore the author has in the citations given preference to New York decisions, he has not ignored the decisions from other States bearing upon questions of statutory construction. For this reason, and the further fact that many of the provisions of statutes of other States are taken bodily from the New York Code, the book will be found of more or less value in all of the States. It seems unnecessary to enter into any detailed statement as to its contents, and it is sufficient to say that the subject of the organization, management, powers, obligations, rights and privileges of corporations as declared by statute and construed by courts, is exhaustively treated. There are many citations of cases from western and southern States. The book also embraces the New York business act, the New York manufacturing act, the New York condemnation law, the New York weekly payment of wages law, the New York consolidated corporation law, and the New Jersey and West Virginia acts. There will also be found forms, useful in the organization and management of corporations, adapted to the New York Code. It is evident from an examination of this book, that Mr. Kerr's work has been conscientiously performed, and in a direction which will be of great practical value to the business corporation lawyer. The system of arrangement of the text containing the substance of the statutes, and the notes containing the decisions thereupon, is very good, and the method of arranging the authorities alphabetically by States in inverse order of the decisions to which the year of filing is appended is very useful. The book contains one thousand pages, is well indexed and well printed.

BOOKS RECEIVED.

THE AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated. By A. C. Freeman and the Associate Editors of the "American Decisions." Vol. 16. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1891.

A TREATISE ON THE LAW OF SALES of Personal Property, Including the Law of Chattel Mortgages. By Christopher G. Tiedeman, Author of "Real Property," "Commercial Paper," etc., etc. St. Louis: The F. H. Thomas Law Book Co. 1891.

FORMS FOR MISSOURI PLEADING. Also Chapters on Advertisements, Affidavits, Arbitration, Assignments, Depositions, Homesteads, and Naturalization of Aliens, with Forms for each Topic. By Everett W. Pattison, Esq., Author of "Pattison's Digest" and the New "Missouri Form Book." St. Louis, Mo.: The Gilbert Book Co. 1891.

FORMS IN CONVEYANCING and General Legal Forms, Comprising Precedents for Ordinary Use, and Clauses Adapted to Special and Unusual Cases. With Practical Notes. By Leonard A. Jones, Author of Treatises on "Mortgages of Real Property," "Chattel Mortgages," "Railroad Securities," "Pledges and Collateral Securities," etc., etc. Second Edition, Revised. Boston and New York: Houghton, Mifflin & Co. The Riverside Press, Cambridge. 1891.

QUERIES.

QUERY NO. 5.

Can a wife obtain title to real estate as against the husband, even when they are living separate and apart? H.

QUERY NO. 6.

A, a married man, makes and delivers to his wife a conveyance of their homestead in Illinois, the wife not joining in the execution of the deed. Before the wife records her deed, A conveys the property by warranty deed to B, the wife not joining in it. B places his deed on record before the wife records hers, without any *actual* notice of the wife's claim to the property. Does the wife's possession of her unrecorded deed, and residing with her husband on the property, the homestead, constitute notice of her claim to the property, so as to defeat B's title taken in good faith without notice in fact? It is an unsettled question in Illinois; who can refer to an authority upon the subject?

QUERY NO. 7.

A, by power of attorney, appoints B his agent with power of substitution. B, under the power of substitution, appoints C, who, acting under the power of attorney, receives money due A and remits the same to B, who fails to account to A. Can A recover from C? Did any authority remain in B after the substitution of C?

QUERIES ANSWERED.

QUERY NO. 4.

(*To be found in Vol. 32 Cent. L. J. p. 150.*)

Yes. Guardianship absolutely terminates at majority of ward. Mendes v. Mendes (Eng.) 624; Matter of Nichol, 1 Johns. Ch. 25; Norton v. Strong, 1 Conn. 65; Jones v. Ward, 10 Yerg. (Tenn.) 160; Stroup v. State, 70 Ind. 495; Overton v. Beavers, 19 Ark. 623; Tate v. Stevenson, 55 Mich. 320; People v. Brooks, 22 Ill. App. 594; Ross v. Gill, 4 Call (Va.), 250. M.

HUMORS OF THE LAW.

A lawyer walked down the street recently with his arms filled with a lot of law books. A friend meeting him remarked, pointing to the books:

"Why, I thought you carried all that stuff in your head?"

"I do," quickly replied the lawyer, with a knowing wink; "these are for the judges."

When practicing at the bar, the late Baron Dowse had to deal with a case in which certain pigs had been injured in a fire on board a steamer. "Gentlemen of the jury," he said, "it was a rash act on the part of the owners (of the steamer) to allow these pigs to be lost, but to allow them to be roasted was a rasher."

A miller had his neighbor arrested upon the charge of stealing wheat from his mill, but being unable to substantiate the charge by proof, the court adjudged that the miller should make an apology to the accused. "Well," says he, "I have had you arrested for stealing my wheat. I can't prove it, and am sorry for it."

A NOTED criminal lawyer was making a discourse to the jury in defense of a party on trial for burglary, whose face bore an expression of childlike innocence. "Gentlemen of the jury," said the learned advocate, "look upon the face of my client and tell me if it does not carry the perfect imprint of honesty!"

Sarcastic juror (sotto voice): "Yes, but the print contains many typographical errors.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCORD AND SATISFACTION—Securities.—Where a creditor accepts his debtor's notes secured by a chattel mortgage for part of the debt due, in satisfaction of the whole, the whole debt is extinguished.—*Jaffray v. Davis*, N. Y., 26 N. E. Rep. 351.

2. ACCOUNT—Pleading—Evidence.—In a suit by attachment on accounts not due, they cannot be verified at the institution of the suit so as to make them admissible in evidence under Rev. St. Tex. 1879, art. 2266.—*Sims v. Howell Bros. Shoe Co.*, Tex., 15 S. W. Rep. 120.

3. ACCOUNTING.—Where the vendee of land afterwards agrees with his vendor to pay off certain debts of the vendor, to sell the land, and to account to the vendor for the proceeds less "all the money that may be legally due him," he is entitled to credit on such accounting for the purchase price paid by him for the land, for all incumbrances thereon which he has paid off.—*Hendrickson v. Reed*, Ind., 26 N. E. Rep. 205.

4. ACCOUNTING—Trustee.—There being no full and true disclosure of the condition of trust property by a trustee a written release by one occupying the position of beneficiary works no estoppel to require an accounting.—*Barton v. Fuson*, Iowa, 47 N. W. Rep. 774.

5. ADMINISTRATION—Probate of Foreign Will.—A foreign will, if executed according to the laws of this State, may be admitted to probate here, and letters of administration with the will annexed issued, although the testator left only personal property in this State.—*In re Washburn's Estate*, Minn., 47 N. W. Rep. 790.

6. ADMINISTRATION—Rights of Minor.—A year's support for a minor child of a married woman cannot be assigned out of her estate, upon her death intestate, having her husband, the father of the child, surviving.—*Daniel v. Phelps*, Ga., 12 S. E. Rep. 784.

7. ALTERATION OF INSTRUMENT—Sureties.—The addition of the name of a surety to a promissory note, after its delivery to the payee, without the knowledge or consent of the maker, is not such an alteration of the instrument as will discharge the maker.—*Barnes v. Vankeuren*, Neb., 47 N. W. Rep. 848.

8. APPEAL— Bond. — On appeal from a judgment in a justice's court against the defendant, and the sureties on a bond given by him on replevying property seized on attachment issued in the cause, the sureties on the replevin bond are competent as sureties on the appeal bond.—*Witten v. Caspary*, Tex., 15 S. W. Rep. 47.

9. APPEAL—Execution. — Judgment having been entered in a justice's court against a defendant and the sureties on a bond given by him, an appeal by the defendant inures to the benefit of the sureties, though they do not join therein.—*McKay v. Irion*, Tex., 15 S. W. Rep. 123.

10. APPEAL— Objections to Evidence. — Where a witness is asked what, in his estimation, was the damage done by the cattle trespassing on pasture land, and the question as objected to on the ground that it is "incompetent, irrelevant, and immaterial as asking for a conclusion, and as not the proper way to prove damages," the point that the witness had not been shown to possess the requisite knowledge to express an opinion cannot be raised for the first time on appeal. — *Brumley v. Flint*, Cal., 25 Pac. Rep. 683.

11. APPEAL FROM PROBATE COURT.—On the final settlement of an administrator, the probate court having charged him with a certain sum, and ordered distribution thereof, the judgment is final, and an appeal lies at once, though the settlement is continued under Rev. St. Mo. 1879, § 241.—*Bronson v. Bronson*, Mo., 15 S. W. Rep. 74.

12. APPEAL WITHOUT BOND.—On appeal from justice's court to the county court without bond, an affidavit *in forma pauperis* that the appellants "are unable to pay the costs," is insufficient, under Rev. St. Tex. 1879, art. 1401.—*Golightly v. Irvine*, Tex., 15 S. W. Rep. 48.

13. APPEALABLE ORDERS — Special Proceedings.—In a special proceeding by an heir of a decedent to require defendant to account for property of the estate alleged to be in his possession, an order was made which recited that defendant "has in his possession property belonging to the estate of" decedent, and directed the administrator to bring an action for the recovery of such property: *Held*, under Code Iowa, § 3164, that the order was not appealable. — *In re Pyle's Estate*, Iowa, 47 N. W. Rep. 864.

14. ASSIGNMENT—Security.— Upon the facts held that the assignment to a creditor of two life policies with authority to sell, though absolute on its face and though the premiums were thereafter paid by the creditors was intended as security only. — *Bacon v. Kienzel*, N. J., 21 Atl. Rep. 37.

15. ASSIGNMENT FOR BENEFIT OF CREDITORS — Preferences. — Under the Tennessee statute, which declares that "preferences of creditors in general assignments of all a debtor's property shall be illegal and void," an assignment containing preferences is only voidable. The preferred creditors are entitled to their ratable share of the assigned property, in spite of the illegal preference.—*Comer v. Tabler*, U. S. C. C. (Tenn.), 44 Fed. Rep. 467.

16. ATTACHMENT—Claimant's Bond.—Where in attachment proceedings in intervention are dismissed without any trial on the merits, for the reason that the claimant's bond was not filed in time, and there is merely a judgment for costs for the attaching creditor,

and the claimant makes no further effort to establish his right to the property, the attaching creditor can sue on the claimant's bond if the property is not returned by him.—*Wallace v. Terry*, Tex., 15 S. W. Rep. 35.

17. ATTORNEYS—Disbarment.—Under Code Civil Proc. Cal. § 287, providing that an attorney may be disbarred for the reason, among others, that he has been convicted of a crime involving moral turpitude, the supreme court has no authority to proceed against a member of the bar upon a mere verified accusation of larceny, preferred by another attordey.—*In re Tilden*, Cal., 25 Pac. Rep. 688.

18. BAIL—Recitals of Bond.—Under Code Crim. Proc. Tex. art. 288, subd. 3, a bail bond reciting that defendant is charged with "unlawfully marrying P, he [defendant] then and there having a wife living," is void for failure to show that he married P. in Texas, that being essential to the crime of bigamy, under the law of Texas.—*La Rose v. State*, Tex., 15 S. W. Rep. 33.

19. BASTARDY—Evidence.—In a prosecution for bastardy, defendant is bound by the answers of the complaining witness given on cross-examination denying that she scuffled with another man in the presence of her whole family about the time the child was begotten, but may prove that she was about that time with other men under suspicious circumstances.—*Humphrey v. State*, Wis., 47 N. W. Rep. 837.

20. BENEFIT SOCIETIES — Beneficiaries. — Where the beneficiaries named in the certificate of a benefit society are the member's three children, all he then has, an after-born child by a second wife cannot claim a share of the fund, on the ground that the object of the society, as expressed by its laws, is to afford aid to the "widows, orphans, and heirs, or devisees" of a deceased member. —*Spry v. Williams*, Iowa, 47 N. W. Rep. 890.

21. BONA FIDE PURCHASER. — Where plaintiff bought and paid for land and took a warranty deed, and his grantor afterwards procured the holder of the legal title to convey to plaintiff by a deed of bargain and sale, with a covenant of warranty "against the claim or claims of any person or persons whatsoever," plaintiff takes the legal title free from an equity known to both his grantors, but of which plaintiff himself has no notice.—*Thompson v. Wooldridge*, Mo., 15 S. W. Rep. 76.

22. BURDEN OF PROOF — Justification. — In an action for wrongfully removing plaintiff's yacht from her dock to another place, where she was sunk and injured, defendant, who admits the yacht to be plaintiff's and justifies the removal by plaintiff's authority, has the burden of proof in respect of such justification. — *Blunt v. Barrett*, N. Y., 26 N. E. Rep. 318.

23. CARRIERS OF PASSENGERS — Contract. — Where a railroad agent at the regular ticket office sells a ticket good only on a special train which is in charge of a third person, whose name is signed to the ticket, but of whose contract with the carrier the purchaser is ignorant, such sale constitutes a contract of transportation binding on the carrier. — *Eddy v. Harris*, Tex., 15 S. W. Rep. 107.

24. CARRIERS OF PASSENGERS.— If a person knowingly induces the conductor of a railway train to violate a rule of the company, and to carry him without charge, he is guilty of a fraud on the company, and cannot claim the rights of a passenger. — *McVeety v. St. Paul, etc. Ry. Co.*, Minn., 47 N. W. Rep. 809.

25. CARRIERS OF PASSENGERS—Negligence.—A steamboat started from the pier just as the gang-plank was hauled up. The mate immediately brought the gate to the gangway opening, and was setting it in position, when a man brushed past him and jumped into the water, whereupon all the passengers rushed to the gangway, and plaintiff, a passenger, was pushed by the crowd into the water. The boat had then moved only 40 feet along the pier: *Held*, that it was not negligence to start before the gate was fastened across the gangway, since such an accident could not reasonably have been anticipated.—*Cleveland v. New Jersey Steam-Boat Co.*, N. Y., 26 N. E. Rep. 327.

26. CHATTEL MORTGAGE—Description.—Description of mortgaged property which included cattel, *held*, sufficient where it appeared that the mortgagor owned the stock described and they were on the farm mentioned which was the only one he owned in that township.—*McGarry v. McDonald*, Iowa, 47 N. W. Rep. 866.

27. CHATTEL MORTGAGE—Foreclosure.—J H a junior mortgagee of chattels in the possession of G, who had advertised the same for sale 8 months before the mortgage debt would become due refused the tender of J H of the amount due. The junior brought replevin for the property before a justice of the peace who found for the defendants entering judgment for the amount of the appraisement of the property double that of the debt with the cost of advertising as damages for detention and for costs. The district court having affirmed the judgment, *held* error, inasmuch as judgment should have been given for the amount of the debt only without damages and all costs against defendants.—*Hull v. Godfrey*, Neb., 47 N. W. Rep. 850.

28. COLLISION—Damages.—The libelant in a collision suit is entitled to recover such damages as naturally follow from the negligence of the respondent, and to have his vessel restored as nearly as possible to her condition before the collision.—*The Alaska*, U. S. D. C. (Mich.), 44 Fed. Rep. 498.

29. CONSTITUTIONAL LAW—Adulteration of Food.—Acts 22 Gen. Assem. Iowa, ch. 79, to prevent fraud in the sale of lard is not an unwarrantable interference with trade in an article of food and in violation of the State and federal constitution as taking property without due process of law.— *State v. Snow*, Iowa, 47 N. W. Rep. 777.

30. CONSTITUTIONAL LAW—Railroad Companies.—Gen. St. Ky. ch. 55, art. 1, § 12, providing that, where a railroad company has been given its right of way free of charge, it shall be fenced at the entire cost of the company, after notice from the adjoining land-owner that the fence must be built, is unconstitutional, in that it delegates to such land-owner the authority to determine whether a fence is necessary.—*Ohio & M. Ry. Co. v. Todd*, Ky., 15 S. W. Rep. 56.

31. CONTEMPT — Liquor Nuisance — Injunction. — A lessee of the property, though no party to the the injunction, and ignorant of the proceedings, may be punished for contempt if he maintains a liquor nuisance thereon, since the injunction operates *in rem*, and attaches to the property in whosesoever hands it may come.—*Silvers v. Traverse*, Iowa, 47 N. W. Rep. 888.

32. CONTRACT—Oil Lease—Construction.—A lease requiring prosecution of drilling "to success," *held* to require the production of oil or gas in quantities capable of division between the parties according to the terms of the lease.—*Kennedy v. Crawford*, Pa., 21 Atl. Rep. 19.

33. CONTRACTS — Parol — Statute of Frauds.—When plaintiff does not seek a specific performance of the oral agreement, but only damages from defendant's breach of it, the statute of fraud has no application to the case.—*Heilman v. Weinman*, Pa., 21 Atl. Rep. 29.

34. CONTRACT OF HIRING—Construction.—Under a written contract providing that plaintiff shall travel over his route six times a year, paying his own expenses, and that he shall receive from defendant a commission upon "all orders accepted from *bona fide* purchasers," viz, on all goods "sold to trade not heretofore sold by us," 10 per cent.; on all goods "to our regular trade," 5 per cent.,—plaintiff is entitled to commissions on all orders made by purchasers on the line of his route, whether taken and forwarded by him or not.—*Taylor v. Enoch Morgan's Sons' Co.*, N. Y., 26 N. E. Rep. 314.

35. CONVERSION—Warehouseman.—The right to sell articles deposited for storage upon which charges were due, ceased as soon as the sale had produced enough (under ch. 199, Laws 1889), to satisfy the charges overdue the months and expenses of sale.—*Jesurun v. Kent*, Minn., 47 N. W. Rep. 784.

36. CORPORATION—Lease to Foreign Corporation.—A resolution of a board of directors of a domestic corporation construed as contemplating a transfer of its property and a surrender of the management of its business to a foreign corporation for the period of 25 years, in consideration of a specified percentage of the proceeds to be paid by the latter.—*Small v. Minneapolis Electro Matrix Co.*, Minn., 47 N. W. Rep. 797.

37. CORPORATION — Mortgage — Estoppel. — When a mortgage given by a corporation to secure a loan of money, which is used in its business, is executed by officers who own all but one share of its stock, both the corporation and the officers personally are estopped from setting up a want of authority in the corporation to give the mortgage.—*Witter v. Grand Rapids Flouring Mill Co.*, Wis., 47 N. W. Rep. 729.

38. CORPORATION—Quieting Title.—Where an association of proprietors of common land has, for more than 50 years, been in possession of the land, and has, during all that time, acted as a corporation under proceedings of incorporation regular on their face, the validity of the proceedings cannot be attacked by proof that the proprietors had not the kind of title necessary for a valid act of incorporation.—*Proprietors v. Inhabitants of Ipswich*, Mass., 25 N. E. Rep. 239.

39. CORPORATION—Rights of Creditors.—The creditors of a corporation have an equitable claim on the corporate property which may be asserted against the stockholders, to whom the property has been apportioned on a dissolution of the corporation, and the fact that it was not lawfully dissolved is immaterial.—*Panhandle Nat. Bank v. Emery*, Tex., 15 S. W. Rep. 23.

40. CORPORATION—Stock.—Evidence *held*, not sufficient to sustain a defense to a suit to compel a corporation to transfer certain of its stock which plaintiff had bought, that the stock was issued to plaintiff's vendor on account of his fraudulent representations.—*American Wire Nail Co. v. Bayless* Ky., 15 S. W. Rep. 10.

41. CORPSE—Removal—Physician.—Rev. St. Wis. § 4592, which provides a penalty for exhuming and removing any human body, or the remains thereof, has no application to an autopsy made by a physician at the tomb of a deceased, under legal direction, and at the request of the relatives, for the purpose of ascertaining whether a crime has been committed in producing his death.—*Palmer v. Broder*, Wis., 47 N. W. Rep. 744.

42. COVENANTS AGAINST NUISANCES.—The owner of adjoining city lots numbered 22 and 24, conveyed number 24 by deed containing the clause covenanting that he will not erect or cause to be erected on lot number 22, any building which should be regarded as a nuisance, *held* that the covenant was against such direction by the grantor alone and he is not liable under it for the nuisance erected by the grantee on lot number 22, whose conveyance contained no restrictions as to use.—*Clark v. Devoe*, N. Y., 26 N. E. Rep. 275.

43. CRIMINAL EVIDENCE—Abusive Language.—On the trial of an indictment for using abusive language tending to cause a breach of the peace, it is competent to show, in rebuttal to the prisoner's statement, that he used other abusive words on the occasion in addition to those alleged in the indictment.—*Porter v. State*, Ga., 12 S. E. Rep. 583.

44. CRIMINAL EVIDENCE—Conspiracy.—In action for conspiracy to defraud, conversations and correspondence between two or more of those charged tending to prove the formation of the conspiracy before it was joined by another of the defendants are admissible.—*St. Paul Distilling Co. v. Pratt*, Minn., 47 N. W. Rep. 789.

45. CRIMINAL EVIDENCE—Homicide—Threats.—When the proper foundation has not been laid, evidence cannot be received as to the prior acts, conduct, or threats of the deceased against the defendant.—*State v. Bowser*, La., 8 South. Rep. 474.

46. CRIMINAL EVIDENCE—Murder—Insanity as a Defense.—Where insanity, induced by epilepsy, is relied on as a defense, it is proper to exclude the question propounded to an expert whether defendant "could not have committed the crime in one of these fits," as there is no question in the case whether an insane epileptic could or could not commit a homicide.—*People v. Smiler*, N. Y., 26 N. E. Rep. 312.

47. CRIMINAL EVIDENCE—Perjury.—On an indictment for perjury alleged to have been committed by defendant is testifying to facts to establish an *alibi* for one J on the trial of J for theft, the record of a second trial of J for such theft is not admissible in evidence.—*Gibson v. State*, Tex., 15 S. W. Rep. 118.

48. CRIMINAL LAW—Carrying Weapons.—One who carries a pistol from his residence to his place of business, for the purpose of cleaning it, is not guilty of unlawfully carrying weapons, within Pen. Code Tex. art. 318.—*Boisseau v. State*, Tex., 15 S. W. Rep. 118.

49. CRIMINAL LAW—Constitutional Law.—Constitution U. S. Amendment 14, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, does not render applicable to prosecutions in State courts under Const. U. S. Amendment 6, which provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him.—*People v. Fish*, N. Y., 26 N. E. Rep. 319.

50. CRIMINAL LAW—Homicide.—Facts herein *held* sufficient to sustain verdict of murder in the second degree.—*State v. Murdy*, Iowa, 47 N. W. Rep. 867.

51. CRIMINAL LAW—Homicide—Self-defense.—Where there is evidence that defendant was assaulted on his own premises by deceased and two others, it is error to instruct that the killing was not justified if it could have been avoided by a retreat, without telling the jury under what circumstances a retreat was not necessary.—*Perkins v. State*, Wis., 47 N. W. Rep. 827.

52. CRIMINAL LAW—Incest.—Where the evidence introduced on a trial for incest shows that the offense was committed, if at all, more than three years prior to the finding of the indictment, and the court instructs the jury that, to convict, they must find that the offense was committed within three years prior to the finding of the indictment, a judgment on a verdict of conviction will be set aside, though it appears from the evidence that by subtracting the time of the defendant's non-residence from the intervening time, less than three years would remain.—*State v. Moore*, Iowa, 47 N. W. Rep. 772.

53. CRIMINAL LAW — Rape — Assault on Child.—In a prosecution for an assault upon the person of a girl under the statutory age of consent with intent to commit a rape, it is not necessary to allege or prove that the acts were done against her will. Whether she consented or resisted is immaterial.—*Davis v. State*, Neb., 47 N. W. Rep. 854.

54. CRIMINAL LAW—Venue.—Act Ky. 1890, providing for a change of venue on the application of the commonwealth, where an impartial trial cannot be had in the county where the crime was committed, is constitutional.—*Com. v. Davidson*, Ky., 15 S. W. Rep. 53.

55. CRIMINAL LAW—Witnesses—Preliminary Examination.—When the witness cannot be found, and the search and inquiry for him lead the officer to the conclusion that he has left the State, the depositions on the preliminary trial may be admitted.—*State v. Riley*, La., 8 South. Rep. 469.

56. CRIMINAL PRACTICE — Assault.—An indictment charging that defendants with deadly weapons assaulted prosecuting witness "with intent then and there unlawfully and feloniously to beat, strike, wound and bruise" him, "and did inflict * * * a great bodily injury," etc., is insufficient to charge an assault with "the intention to inflict a great bodily injury."—*State v. Harrison*, Iowa, 47 N. W. Rep. 777.

57. CRIMINAL PRACTICE — Challenges of Jury.—Code Iowa, secs. 4413, 4414, as amended by 22d Gen. Assem., ch. 29, providing that in impanneling a jury to try a felony punishable by death or imprisonment for life, the State and defendant are each entitled to ten peremptory

challenges in force at the trial, and not the one in force at the time of the commission of the offense, governs the number of peremptory challenges to be permitted.—*State v. Shreves*, Iowa, 47 N. W. Rep. 899.

58. CRIMINAL PRACTICE—Costs.—When the defendant, in a criminal action, pending in justice's court, is acquitted, the county is not liable for the fees of an officer incurred in the service of a subpœna upon a witness for the defense.—*Hendershott v. Board County Com'rs Fillmore County*, Minn., 47 N. W. Rep. 810.

59. CRIMINAL PRACTICE — Embezzlement by County Treasurer.—An indictment for embezzlement which alleges that defendant unlawfully and feloniously embezzled and converted to his use certain public money in his hands as county treasurer, without authority of law, and that he converted the same by expending it for his private business, and by permitting others so to use it, is not bad for duplicity.—*State v. King*, Iowa, 47 N. W. Rep. 775.

60. CRIMINAL PRACTICE—Felonious Shooting.—An information for felonious shooting with intent to murder is not double by reason of stating that the defendant did feloniously make an assault with a dangerous weapon.—*State v. Parker*, La., 8 South. Rep. 473.

61. CRIMINAL PRACTICE—Joinder of Offenses.—Though the offenses denounced by section 794 Rev. Laws, viz., (1) inflicting a wound less than mayhem with a dangerous weapon, and (2) inflicting a like wound with intent to kill, are separate and distinct offenses, yet it is settled that they may be conjunctively charged in the same count of indictment without duplicity.—*State v. Stanley*, La., 8 South. Rep. 469.

62. CRIMINAL PRACTICE—New Trial.—A motion for a new trial in a criminal case to avail the party making, must be filed at the term of court at which the verdict is returned, and, except for newly discovered evidence, within three days after the verdict was rendered, unless unavoidably prevented.—*Davis v. State*, Neb., 47 N. W. Rep. 851.

63. CRIMINAL PRACTICE— Perjury.— In a prosecution for perjury it must appear upon the face of the indictment that the matter alleged to be false is material, and to charge generally that the false oath was material on the trial of the issue upon which it was taken.—*State v. Jean*, La., 8 South. Rep. 480.

64. CRIMINAL PRACTICE— Perjury— False Swearing.—Though the facts charged constitute perjury at common law, the State may elect to proceed by indictment for false swearing, under Gen. St. Ky., ch. 29, art. 8, § 2.—*Com. v. Maynard*, Ky., 15 S. W. Rep. 52.

65. CRIMINAL PRACTICE—Sentence.—Sentence may be pronounced on a plea of guilty at a term subsequent to that at which the plea was entered.—*Thurmon v. State*, Ark., 15 S. W. Rep. 84.

66. CRIMINAL PRACTICE — Swindling.—An indictment under Pen. Code Tex. art. 790, which defines swindling as "the acquisition of personal or movable property * * * by means of false pretense," etc., "with the intent to appropriate the same to the use of the persons so acquiring," must aver the acquisition of the property by defendant.—*Cannon v. State*, Tex., 15 S. W. Rep. 117.

67. CRIMINAL PRACTICE—Verbal Instructions.—Where, in a criminal case, the jury asked for further instructions, which were given orally, and then agreed upon a verdict of guilty, and so informed the court, the giving of such instructions was erroneous, and the fact that the court detained the jury until the instructions were written out by the stenographer, and sent in to them, and that they then voted upon, and adhered to, their former verdict, does not cure the defect.— *State v. Harding*, Iowa, 47 N. W. Rep. 877.

68. CRIMINAL PRACTICE—Willful Shooting.—In an indictment under section 791 of the Revised Laws, which charges a willful shooting with intent to murder, the omission of the words, "with a dangerous weapon," is no ground to quash.—*State v. Mosely*, La., 8 South. Rep. 470.

69. CRIMINAL TRESPASS—Indictment.—An indictment charging that defendant did "wrongfully * * * cut down * * * and then and there carry * * * and haul away" certain trees does not charge two offenses, under Code Iowa, § 3983.—*State v. Paul*, Iowa, 47 N. W. Rep. 773.

70. DAMAGES—Liquidated — Contract.—*Held*, that the amount agreed to be paid in case of default on a building contract was not a penalty but liquidated damages from which the builder could not be relieved on the ground that performance was prevented by act of God.—*Ward v. Hudson River Building Co.*, N. Y., 26 N. E. Rep. 256.

71. DEATH BY WRONGFUL ACT — Damages.— By the death of a postal-clerk in a collision occasioned by negligence, the railroad company incurs the penalty imposed by Rev. St. Mo. 1889, § 4425, providing that when any person shall die from any injury occasioned by negligence of its officer or agents, in running the trains, etc., it shall pay for such person or passenger so dying $5,000.—*McGoffin v. Mo. Pac. Ry. Co.*, Mo., 15 S. W. Rep. 76.

72. DEATH BY WRONGFUL ACT—Pleading.—In a suit by the parents for the death of a minor son employed by the defendant as a switchman, the petition must show that he left neither wife nor minor children, under Rev. St. Mo. 1879, § 2121.—*McIntosh v. Mo. Pac. Ry. Co.*, Mo., 15 S. W. Rep. 80.

73. DEDICATION—Evidence.—Facts under which: *Held*, not sufficient evidence of a dedication to the public to overcome the presumption that the authorities acted within their powers in conveying the property.—*Latham v. City of Los Angeles*, Cal., 25 Pac. Rep. 673.

74. DEED — Rescission.—Upon the facts: *Held*, that the contract herein required defendant to support and maintain plaintiff on the farm and to give such care and attention as her age and condition demanded, failing in which the deed was properly set aside.—*Patterson v. Patterson*, Iowa, 47 N. W. Rep. 768.

75. DEED—Covenant—Construction.— A covenant by the grantee of land that the grantor "shall at any time have the right of pre-emption of the premises conveyed," at the price of $12,000," does not entitle the grantor to a reconveyance at any time on tendering $12,000, but merely gives him the right to buy it in preference to any one else, whenever the grantee is willing to sell at that price.—*Garcia v. Callender*, N. Y., 26 N. E. Rep. 283.

76. DEED—Construction.—A special warranty deed by the heirs of an intestate of 456 acres of land formerly belonging to such intestate, "with the homestead allowed in the real estate of" the intestate, does not except the homestead out of the 456 acres, the said clause being evidently inserted for the purpose of further identifying the land conveyed.—*Choate v. Johns*, Tex., 15 S. W. Rep. 106.

77. DEED TO UNINCORPORATED COMPANY.—A conveyance to an unincorporated company which goes into possession under the deed passes a title which vests in company subsequently incorporated.—*Clifton Heights Land Co. v. Randell*, Iowa, 47 N. W. Rep. 905.

78. DEVISE—Expectant Estates.—A devise to one in fee, if he survives his wife, or has a child that lives to the age of 21, but, failing these contingencies, then over to another gives the remainder-man an expectant estate within 1, Rev. St. N. Y. pt. 2, ch. 1, tit. 2, § 8, defining it to be one where the "right to possession is postponed to a future period," which, by section 35 of the same chapter, he may alienate by deed, or otherwise.—*Griffin v. Shepard*, N. Y., 26 N. E. Rep. 339.

79. DIVORCE—Desertion.—Facts upon which held that the separation was not an "obstinate desertion" by the husband within the meaning of the statute.—*Costill v. Costill*, N. J., 21 Atl. Rep. 35.

80. DIVORCE—Right to Discontinue.—Upon the facts since it was of great importance that the *status* of the woman and child should be determined, it was not an abuse of discretion for the court to refuse plaintiff's application for a discontinuance.—*Winans v. Winans*, N. Y., 6 N. E. Rep. 293.

81. DIVORCE— Vacating Judgment. — Under Rev. St. Wis. § 2832, a party cannot have a judgment of divorce from bed and board set aside seven years after he was served with the judgment, upon the ground that he was misled into supposing that he was a divorce from the bond of matrimony. — *Jones v. Jones*, Wis., 47 N. W. Rep. 728.

82. DRAINAGE—Counties.— Under Act Ind. 1885, p. 141, § 10, an auditor to whom certificate has been made should not draw his warrant for so much of the costs as was incurred in repairing that part of the ditch situated in another county. — *Crooks v. State*, Ind., 26 N. E. Rep. 193.

83. DRAINAGE—Obstruction.—On the division of a farm to which is attached the right to drain through lands of another, the owners of the several portions may join in a suit to enjoin the obstruction of the drainage.—*Springer v, Lawrence*, N. J., 21 Atl. Rep. 41.

84. EJECTMENT—Pleading—Bill of Particulars.—Where, in a suit to recover possession of land and quiet title thereto, plaintiff has filed a sufficient abstract of title, he cannot be compelled to furnish a more specific abstract and a bill of particulars. — *Roberts v. Vornholt*, Ind., 26 N. E. Rep. 207.

85. ELECTION—Widow.—A widow is not bound by her election to take the provision made for her by her husband's will where she was ignorant of her rights under the intestate laws when she executed the instrument of acceptance of such provision.— *In re Woodburn's Estate*, Penn., 21 Atl. Rep. 16.

86. ELECTIONS AND VOTERS.—Upon the facts held that the proof was insufficient to show that fraudulent or illegal votes were cast.—*Todd v. Cass County*, Neb., 47 N. W. Rep. 748.

87. EMINENT DOMAIN — Natural Gas Company. — A natural gas company, on condemning a right of way for its pipe-line over lands underlaid with coal, may release the right of support to the surface from the underlying coal; and where it does so the value of the coal should not be taken into consideration in estimating the land-owner's damages. — *McGregor v. Equitable Gas Co.*, Penn., 21 Atl. Rep. 13.

88. EMINENT DOMAIN—Railroad Crossings.—A railroad company which has allowed another company to cross its land which was neither acquired nor used by it for any public use cannot afterwards enjoin the latter company from laying a side track on said land within the limits of its right of way.—*Chicago, etc. R. Co. v. Cincinnati, etc. R. Co.*, Ind., 26 N. E. Rep. 204.

89. EMINENT DOMAIN—Compensation. — In a proceeding by a railroad company to condemn a right of way, the report of the commissioners having been set aside on exception by the land-owner, and the case having gone to trial without any pleadings on his part, he is entitled to full damages for the decreased value of the body of his land taken as a whole.—*Chicago, etc. R. Co. v. Baker*, Mo., 15 S. W. Rep. 64.

90. EMINENT DOMAIN—Award—Mandamus.—*Mandamus* held to lie to compel a railway company to deposit with the county judge the amount of an award for damages on account of the location of railway across premises where it appeared that the right of way had been appropriated and used and the award duly made, under § 97, ch. 16, Comp. St.—*State v. Grand Island, etc. R. Co.*, Neb., 47 N. W. Rep. 857.

91. EQUITY—Review on Appeal.—In cases of equitable cognizance, the findings of fact of the trial judge will not be reversed, unless it is clear that the preponderance of the evidence is against them. — *Rawlins v. Rawlins*, Mo., 15 S. W. Rep. 78.

92. EQUITY—Injunction.— The plaintiff, inventing and preparing a secret code or system of letters, figures, and characters, showing the cost and selling price of its wares and merchandise, for use between itself and its traveling salesmen, has a property therein which the law will protect; and, when the remedy at law is inadequate, courts of equity will lend their aid by granting a temporary injunction, and the appointment of a receiver, in order to prevent irreparable injury *pendente lite*.—*Simmons Hardware Co. v. Waibel*, S. Dak., 47 N. W. Rep. 814.

93. EQUITY—Forfeiture—Relief. — Where a mortgagee covenants with the mortgagor, after the mortgage has become due, not to foreclose during her life-time, so long as no taxes or assessments on the property remain unpaid for more than 30 days, the omission of the mortgagor to pay a sewer assessment of which she was not aware, but which she paid as soon as she learned of it, will not subject her to the loss of the benefit of the agreement.—*Noyes v. Anderson*, N. Y., 26 N. E. Rep. 316.

94. EQUITY— Pleading. — *Held*, that the original and supplementary bill herein were so inconsistent as to be destructive of the complainant's standing in court.—*Leonard v. Cook*, N. J., 21 Atl. Rep. 47.

95. ESTOPPEL — Acquiescence. — In an action to set aside a tax deed for alleged defects where it appeared that for years the owner paid no taxes on the land that he knew of the proceedings resulting in the tax deed and of defendants taking possession and cultivating the land, he was estopped to assert any invalidity of the tax title.—*Baird v. Ellsworth*, Iowa, 47 N. W. Rep. 875.

96. ESTOPPEL—Penal Bond—Seal. — Where a bond recites that it is "sealed with our seals," a surety who knows the difference between sealed and unsealed instruments, reads the bond before signing, and gives it to the principal to be delivered to the obligee, is estopped from denying that it was sealed by him, though in fact the seals were afterwards affixed to the signatures by the principal without the knowledge of the sureties.—*Metropolitan Life Ins. Co. v. McCoy*, N. Y., 26 N. E. Rep, 345.

97. ESTOPPEL—Pleading and Proof. — Under a plea of estoppel, based on the allegation that plaintiff was present when defendant bought the property in dispute, and did not object to the sale, it is error to submit to the jury the question whether plaintiff so acted before the sale as to estop him from asserting title.—*Ford v. Mayo*, Ky., 15 S. W. Rep. 2.

98. ESTOPPEL IN PAIS.—Plaintiff and one H agreed to buy a race horse, part of the purchase money being advanced by each. The bill of sale which was necessary to pass title under the law of Texas where the same was made was executed to H who negotiated sale, and plaintiff did not disclose his interest. H had possession and afterwards sold to defendant who had no notice of plaintiff's claim: *Held* that plaintiff was estopped to assert title adverse to defendant.—*McMurray v. Hughes*, Iowa, 47 N. W. Rep. 883.

99. ESTOPPEL IN PAIS.—To entitle a party to claim that another is estopped by his representations, the representations must have been made to him, or they have been of such a character, and made under such circumstances, that the party making them must be take to have contemplated that they would be communicated to and acted on by him.—*Hodge v. Ludlum*, Minn., 47 N. W. Rep. 805.

100. EVIDENCE — Declarations.—Though declarations made out of court by a witness may be used to impeach the witness, they cannot be treated as substantive evidence to establish the facts which they affirm.—*Watts v. Starr*, Ga., 12 S. E. Rep. 585.

101. EVIDENCE — Common Source of Title.—Where both parties derive title through the same intemediate grantor, it is not prejudicial error to permit plaintiff to put in evidence the copy of the original patent, since the state of the title antecedent to the common source is immaterial.—*Gallagher v. Bell*, Iowa, 47 N. W. Rep. 897.

102. EVIDENCE.—Statements by a seller, tending impeach the buyer's title, made some time after the sale, and not made in execution of a purpose common to both to defraud third persons, but merely narrative of past transactions, and not made in the presence of the buyer, are inadmissible.—*Allen v. Kirk*, Iowa, 47 N. W. Rep. 906.

103. EVIDENCE—Account Books.—Facts sufficient to justify the admission of account books kept by a manu-

facturing firm as competent evidence of items charged in them when supplemented by testimony of the workmen and some members of the firm as to their correctness.—*Cobb v. Wells*, N. Y., 26 N. E. Rep. 284.

104. EXECUTION—Levy on Mortgaged Property.—The levy of an execution on mortgaged chattels after default in the conditions of the mortgage gives the execution creditor no lien on the property, since, after condition broken, the mortgagor has no legal title.—*Leadbetter v. N. H. Leadbetter*, N. Y. 26 N. E. Rep. 265.

105. EXECUTION—Two Judgments.—Under Code Tenn. § 3083, the circuit court properly renders one judgment of condemnation of land, and issues one *vend. exp.* for the satisfaction of two judgments in favor of the same plaintiff, and against the same defendant, transmitted to it at the same time by a justice of the peace, though the aggregate of the two judgments is beyond the justice's jurisdiction.—*Tuck v. Chaffin*, Tenn., 15 S. W. Rep. 97.

106. EXECUTION — Claims of Third Parties. — The unauthorized insertion of an execution of words showing that it is for the use of an assignee of the judgment should be rejected as surplusage, and disregarded, on a trial of the right of property levied on.—*Owens v. Clark*, Tex., 15 S. W. Rep. 101.

107. EXECUTORS—Foreign Executor.—In Kentucky, a foreign executor cannot sue to enforce the specific performance of a contract, unless he first takes out ancillary letters of administration.—*Marreth v. Babb's Ex'r.*, Ky., 15 S. W. Rep. 4.

108. EXECUTORS—Claims Against. — Under Code Civil Proc. Cal. §§ 1536, 1545, one whose claim against the executor for services to the estate has been allowed by the court, may make application for the sale of land to pay it, and the court has jurisdiction to settle and allow such claim without waiting for the executor to pay it.—*In re Kout's Estate*, Cal., 25 Pac. Rep. 685.

109. EXECUTORS — Bond. — Though the will provides that bond shall not be required of the executor, yet where he is managing the assets so as to diminish the security of the creditors, and the debts are increasing while the assets are decreasing, it is proper for the court to order him to give bond equal to the value of the personal assets.—*In re Holderbaum's Estate*, Iowa, 47 N. W. Rep. 898.

110. EXECUTORS AND ADMINISTRATORS.—A resident of Arkansas died intestate, leaving property in Arkansas and Louisiana. Administrators were appointed in each State. A resident of Louisiana recovered judgment on a claim against the estate in an action against the Louisiana administrator. She did not present her claim to the Arkansas administrator until after the two years allowed for filing claims had elapsed, and distribution had been made: *Held*, that after her claim was barred in Arkansas she could not pursue the assets in the hands of the heirs in that State.—*Turner v. Risor*, Ark., 15 S. W. Rep. 13.

111. EXECUTORS AND ADMINISTRATORS.—Where the laws of one of two joint executors are revoked and he is afterwards decreed to pay to the remaining executor the value of property wasted by him, the remaining executor may sue on the other's bond for the amount this decreed to be paid, though execution has issued on such decreed to be paid, though no execution has issued on such decree.—*Hood v. Hayward*, N. Y., 26 N. E. Rep. 331.

112. FIXTURES—Vendor and Vendee.—Houses built on mud-sills resting upon the soil, which is not disturbed, are affixed to the land within the terms of Civil Code Cal. § 660, declaring that "a thing is deemed to be affixed to the land when it is * * * permanently resting upon it, as in the case of buildings."—*Miller v. Waddingham*, Cal., 25 Pac. Rep. 688.

113. FORCIBLE DETAINER—Indictment.— In an indictment for forcible detainer, under Act Pa. March 31, 1860, (1 Purd. Dig., 10th Ed., p. 320), it is essential to allege the prior possession of the tenant and a detainer by force, "and with a strong hand, or by menances or threats thereto," and an allegation of detainer "with force and arms" is not sufficient. — *Commonwealth v. Brown*, Penn., 21 Atl. Rep. 17.

114. FRAUDULENT CONVEYANCE — Estoppel. — Where defendant was given credit upon the statement that he was the owner of a certain lot in which the wife had an equitable title, but which was thereafter conveyed in exchange for other lots to the wife: *Held*, that this was a fraud upon the plaintiffs who upon return of an unsatisfied execution might subject the new lots to their judgment.—*Hopkins v. Joyce*, Wis., 47 N. W. Rep. 722.

115. FRAUDULENT CONVEYANCE—Husband and Wife.—Under the married woman's act there can be no presumption that a husband when he received money of his wife takes it by virtue of his martial power as his own.—*Chadbourne v. Williams*, Minn., 47 N. W. Rep. 812.

116. FRAUDULENT CONVEYANCES — Secret Trust. — To wreck a mining company, and cover up its assets, the stockholders allowed its lands and other property to be sold under a deed of trust, and procured a purchaser to bid in the property for the secret use and benefit of the company. The purchaser operated the mines in his own name, but for the use of the company: *Held*, that ores taken out by him were subject to execution against the company. — *State v. McBride*, Mo., 15 S. W. Rep. 72.

117. FRAUDULENT CONVEYANCE — Evidence. — Where the issue is whether a transfer of property was made with intent to hinder, delay, and defraud the creditors of the assignor, evidence as to the solvency or insolvency of such assignor is material, but not necessarily conclusive. — *Walkow v. Kingsley*, Minn., 47 N. W. Rep. 807.

118. GAME-LAWS—Game Killed in Another State.—The object of the game laws is to prevent the killing of quail in Pennsylvania within the period named, and hence it is no violation of the act to offer for sale quail brought from another State, where it was lawful to kill them.—*Com. v. Wilkenson*, Pa., 21 Atl. Rep. 14.

119. GIFTS— Husband and Wife. — Evidence held not sufficient to show a gift from plaintiff to her husband.—*De Vore v. Jones*, Iowa, 47 N. W. Rep. 885.

120. GRAND JURY—Impaneling.—Under Code Iowa, § 4256, as amended, *held*, that one of the panel drawn, having been subsequently excused, that the court might order the sheriff to call a juror from the bystanders, and the selection of one of the panel not previously drawn, would not be proper.—*State v. Silvers*, Iowa, 47 N. W. Rep. 772.

121. HOMESTEAD — Abandonment. — *Held*, that a conveyance by B of homestead premises though defective in execution and the abandonment of the premises were parts of the same transaction and that plaintiff was an innocent purchaser whose title was good as against any claim arising from the sale. — *Corbin v. Minchell*, Iowa, 47 N. W. Rep. 879.

122. HUSBAND AND WIFE — Injuries to Wife.—In an action for personal injuries to the wife sustained prior to February 28, 1887, the husband was a necessary party.—*Barker v. Anniston, etc. R. Co.*, Ala., 8 South. Rep. 466.

123. HUSBAND AND WIFE— Bond for Separate Support.—A wife by reason of differences with her husband left his house and sued for limited divorce. Thereafter suit was settled, and in consideration of money paid by the husband, the father and brother themselves to save him harmless from any further expense on her account: *Held*, that the bond was made in contemplation of continued separation and became a nullity when she subsequently returned to his house. — *Zimmer v. Settle*, N. Y., 26 N. E. Rep. 341.

124. HUSBAND AND WIFE.—Imputed Negligence. — Under Civil Code Cal. §§ 162-164, 169-172, the husband is a necessary party to an action for injuries to the wife, and his contributory negligence is imputable to her.—*McFadden v. Santa Ana, etc. Ry. Co.*, Cal., 25 Pac. Rep. 681.

125. HUSBAND AND WIFE — Improvements on Wife's Land.—Where a husband erects improvements on land

which he has previously voluntarily conveyed to his wife, after informing the latter that he does so in order to secure a larger income on the money expended on the improvements, and the wife consents thereto, saying that, in case he should need to, he could sell the improvements at any time, the husband has a lien on the land for the amount so expended. — *Smith v. Smith*, N. Y., 26 N. E. Rep. 259.

126. INCORPORATING TOWNS — Agricultural Land.— Where a town has been incorporated under the general law of Texas by a legal election, its incorporation will not be declared invalid because there is included within the corporate limits land not laid off into lots or blocks, and the house of one relator, who, though he does no business in the town, yet attends church in it, and sends his children to school there.—*State v. Town of Baird*, Tex., 15 S. W, Rep. 98.

127. INJUNCTION—Acquiescence.—Where the purchasers of land at a foreclosure sale have for nearly 20 years acquiesced in the use of a railroad track constructed on the land by the company with the consent of the mortgagor after the execution of the mortgage, and have used it jointly with the company. A court of equity will not compel the company to tear up the track.—*Chambers v. Baltimore & O. R. Co.*, Penn., 21 Atl. Rep. 2.

128. INJUNCTION—Diversion of Water.—Evidence *held* sufficient to sustain an injunction, in the absence of any finding as to how long such deprivation lasted, or as to whether defendant threatened to continue it.—*Ball v. Kehl*, Cal , 25 Pac. Rep. 679.

129. INJUNCTION—Taking Ice.—Where the evidence fails to show that the taking of ice from a mill pond, under license from the owner of the land beneath it, results in real and substantial injury to the plaintiff in respect of a water privilege by him derived beforehand from the same grantor, an injunction to restrain defendants from taking the ice will be refused.—*Lathrop v. Haley*, Iowa, 47 N. W. Rep. 878.

130. INJUNCTION PENDING APPEAL.—On appeal from a judgment for defendants in an action to restrain the county judge acting for the county from paying over a certain fund to the other defendant, and for a lien thereon, plaintiff is not entitled to an order restraining such payment pending the appeal, where the county is solvent.—*McFadden v. Owens*, Ark., 15 S. W. Rep. 84.

131. INJUNCTION.—*Held*, to lie to restrain a sale under attachment suits of property conveyed to an assignee for the benefit of creditors.—*Wilhoit v. Cunningham*, Cal., 25 Pac. Rep. 675.

132. INSANE PERSON.—The discharge of an inmate of an asylum over whom no guardian had been appointed, restored him to legal capacity, to sue without any further adjudication of his restoration to sanity.—*Kellogg v. Cochran*, Cal., 25 Pac. Rep. 677.

133. INSURANCE—Forfeiture—Waiver.—Forfeiture of a fire policy by breach of warranty to use the building as a foundry and machine shop is not waived by failure of the agent of the company to have the policy declared forfeited after he knew that the building was not used as a foundry and machine shop, where the agent has authority only to take applications and deliver them, or where the knowledge came to him in his individual capacity after the contract of insurance was made.—*Sun Mut. Ins. Co. v. Texarkana Foundry & Machine Co.*, Tex., 15 S. W. Rep. 34.

134. INSURANCE — Reinsurer — Conditions.—Where a policy of insurance is conditioned to be void in case of a change of ownership of the property without the consent of the insurer, and the insurer reinsures the risk covered thereby in another company subject to all the conditions of the policy, the assured can only be required to look to the original insurer for consent to such a change of ownership.—*Faneuil Hall Ins. Co. v. Liverpool, etc. Ins. Co.*, Mass., 26 N. E. Rep. 244.

135. INSURANCE BY MORTGAGOR.—The agent of a creditor applied to the debtor for security, and the latter conveyed to the agent shares in a vessel, receiving back an agreement to reconvey on payment of the debt to the agent, who was described in the bill of sale and agreement as trustee. Thereafter the debtor died, and the trustee took charge of the vessel, and procured to himself insurance thereon: *Held*, that the debtor's administratrix could recover no part of insurance collected by the trustee after a loss.—*Burlingame v. Goodspeed*, Mass., 26 N. E. Rep. 232.

136. INTOXICATING LIQUORS—Destruction of Saloon Fixtures.—A judgment ordering the destruction of the liquors found on the premises, the sale of the furniture, fixtures, and movable property used in carrying on the business, and the closing of the building for one year, is fully authorized under Acts 21st Gen. Assem. ch. 66, §§ 5, 6.—*State v. Adams*, Iowa, 47 N. W. Rep. 770.

137. INTOXICATING LIQUORS—Sales to Drunkards and Minors.—In order to constitute the offense under act Pa. 1887, § 17, it is unnecessary that the accused should know that he is selling to "a person of known intemperate habits." The mere fact of selling to one of that class is sufficient.—*Com. v. Zelt*, Penn., 21 Atl. Rep. 7.

138. INTOXICATING LIQUORS—Original Packages.—*Held*, that it was not the court's duty to define original packages, when not requested to do so.—*Commonwealth v. Swihart*, Penn., 21 Atl. Rep. 11.

139. INTOXICATING LIQUORS—Illegal Sales.—Where defendant and another sold liquor at retail, without a license, in what they claimed to be original packages, and as agents of a firm in West Virginia, the question of the *bona fides* of defendant's agency was properly submitted to the jury.—*Com. v. Bishman*, Penn., 21 Atl. Rep. 12.

140. INTOXICATING LIQUORS—Sale.—On the trial of a person indicted for maintaining a nuisance, by selling, and keeping with intent to sell, contrary to law, intoxicating liquors, it is error to instruct that "it is also unlawful to give away any intoxicating liquor to be used as a beverage."—*State v. Briggs*, Iowa, 47 N. W. Rep. 865.

141. INTOXICATING LIQUORS —Illegal Sales by Agent.—Under Code Iowa, § 1540, prohibiting the illegal sale of liquors by persons not permit holders, an agent who makes unlawful sales of liquors may be convicted, whether his principal holds a permit or not.—*State v. Kriechbaum*, Iowa, 47 N. W. Rep. 872.

142. INTOXICATING LIQUORS — Civil Damage Law — Parties.—In a civil action against a liquor seller and his bondsmen for selling liquor to a minor, it is no defense that the liquor seller, when he sold to the minor, believed, and had reason to believe, that he was an adult. —*McGuire v. Glass*, Tex., 15 S. W. Rep. 127.

143. JUDGMENT—Presumption of Payment.—A judgment upon which no execution has been issued for 20 years, in the absence of explanatory facts or evidence, is presumed to be paid. The burden of proof is on the judgment creditor.—*Beckman v. Hamlin*, Oreg., 25 Pac. Rep. 672.

144. JUDGMENT—Setting Aside—Laches.—In an application by a defendant to set aside a judgment quieting title in the plaintiff rendered after service of summons by publication, the discretion of the court may be influenced by the long-continued neglect of the defendant, both subsequent and prior to the judgment, to interfere with the adverse occupancy of the land by the plaintiff, to pay taxes thereon, or to assert any rights respecting it.—*Nauer v. Benham*, Minn., 47 N. W. Rep. 796.

145. JUSTICE COURT—Pleading.—When a summons in justice court fully sets out the facts constituting plaintiff's cause of action, such action as so shown being founded on a tort, the complaint, when filed, alleging the same facts as the summons, it is not error to refuse to set aside the complaint because the summons contains a notice that, if defendant fail to appear and answer, plaintiff will take judgment for the amount specified in the summons, instead of a notice that he will apply to the court for the relief demanded.—*Berry v. Bingaman*, S. Dak., 47 N. W. Rep. 825.

146. LANDLORD AND TENANT—Removing Property—Affidavit.—An affidavit for the prosecution of a tenant

for removing property from the leased premises is fatally defective when it fails to conclude against the peace and dignity of the State of Mississippi.—*Love v. State*, Miss., 8 South. Rep. 465.

147. LANDLORD AND TENANT—Removing Property—Affidavit.—An affidavit for the prosecution of a tenant for removing property from the leased premises is fatally defective when it avers that the act was done to "defeat payment," but fails to aver an intent to defeat or impair the landlord's lien.—*Edwards v. State*, Miss., 8 South. Rep. 464.

148. LANDLORD AND TENANT—Fixtures.—As long as the lessee remains in possession though the lease has expired he is entitled to remove the building which he was entitled to remove at the expiration of the lease.—*Lewis v. Ocean Nav. & Pier Co.*, N. Y., 26 N. E. Rep. 301.

149. LIBEL BY NEWSPAPER—Notice to Publisher.—In an action for the publication of a libel in a newspaper it is not necessary, in order to recover "actual" damages, to allege service upon the publishers of the paper of the notice provided for in chapter 131, Gen. Laws 1889.—*Clementson v. Minnesota Tribune Co.*, Minn., 47 N. W. Rep. 781.

150. LIBEL AND SLANDER—Pleading.—A declaration for slander herein *held*, sufficient on general demurrer under Pub. Stat. Mass. ch. 167, sec. 91, making innuendoes unnecessary.—*Clark v. Zettick*, Mass., 26 N. E. Rep. 234.

151. LIFE INSURANCE—Application.—Where an application which is made a part of the policy stipulates that the answers to the questions propounded are warranted by the insured to be true and that the policy shall be void if untrue, the falsity of the answer irrespective of insured's intention in giving it avoids the policy.—*Cobb v. Cov. Mut. Ben. Ass'n*, Mass., 26 N. E. Rep. 230.

152. LIMITATION OF ACTIONS—Suspension of Statute.—In Texas the filing of a petition in court is a commencement of the action, so as to stop the running of the statute of limitations; and, as the laws of the State require the clerk upon the filing of the petition to issue citation, any delay in the issuance of process to affect the running of the statute must result from the instructions or request of plaintiff or his authorized attorney.—*Davidson v. Southern Pac. Co.*, U. S. C. C. (Tex.), 44 Fed. Rep. 476.

153. LIMITATION OF ACTIONS—Witness Fees—Amendment of Pleading—Dormant Judgment.—An action on an account to recover witness fees is barred in two years from the time they accrued, by the Texas statute, limiting to that time actions for debt not evidenced by contract in writing, and actions on stated or open accounts.—*Ballard v. Murphy*, Tex., 15 S. W. Rep. 42.

154. MALICIOUS PROSECUTION—Advice of Counsel.—It is no defense to an action for malicious prosecution by one who did not believe defendant guilty of the crime charged that he made the complaint upon the advice of counsel, after a full and fair statement of all the facts within his knowledge.—*Johnson v. Miller*, Iowa, 47 N. W. Rep. 903.

155. MANDAMUS—Jurisdiction of Supreme Court.—The Supreme Court has no power to compel, by *mandamus*, a district judge to certify to the governor the facts showing that a special judge should be appointed to try a certain case, since there was no law authorizing an appeal from a refusal to issue such a certificate.—*Grigsby v. Bowles*, Tex., 15 S. W. Rep. 30.

156. MARRIAGE BROKERAGE CONTRACTS.—Money paid to a marriage broker may be recovered as obtained by constructive fraud, and the party who paid the money will not be regarded as *in pari delicto* with the marriage broker.—*Duval v. Wellman*, N. Y., 26 N. E. Rep. 343.

157. MASTER AND SERVANT—Defective Appliances.—When defective cars belong to another company, from which they have been received, the company receiving and using them will be held liable in damages if the injury be owing to their defectiveness.—*Bomar v. Louisiana, etc. R. Co.*, S. South. Rep. 478.

158. MASTER AND SERVANT—Release by Servant.—An instrument executed by a railway employee after he has entered the service, releasing the company from all liability for any damages or injury to him by reason of the company's negligence, is void for want of consideration, there being no promise on the part of the company to give him other or new employment or to continue him in its service.—*Purdy v. Rome, W. & O. R. Co.*, N. Y., 26 N. E. Rep. 255.

159. MASTER AND SERVANT—Independent Contractors.—Defendant had a contract to construct a sewer in the streets of a city, in which the city reserved the right to "vary, extend or diminish the quantity of work during its progress." Before the work was completed, he was directed to make certain changes in the grade of the sidewalk, which his workmen did in such fashion as to leave a hole near the curb, into which plaintiff fell and was injured: *Held*, that defendant was an independent contractor as to this work, and is liable for the negligence of his workmen therein.—*Charlock v. Freel*, N. Y., 26 N. E. Rep. 262.

160. MASTER AND SERVANT—Fellow-servant.—Upon the facts *held*, that plaintiff engaged in sorting lumber, and those who piled the lumber were fellow servants within the law as to master and servant.—*Fraser v. Red River Lumber Co.*, Minn., 47 N. W. Rep. 785.

161. MASTER AND SERVANT—Defective Appliance.—Several actions by workmen against their employer for injuries received by them from the fall of an alleged defective staging were tried together. There was evidence that plaintiff D had said that the fall of the staging was caused by a stone let fall by him and another: *Held*, that this declaration was admissible against D alone.—*Drommie v. Hogan*, Mass., 26 N. E. Rep. 237.

162. MEASURE OF DAMAGES—Injuries.—In an action for personal injuries by one who is suffering from Bright's disease, not caused by the injuries complained of, it is proper to charge that the jury should take that fact into consideration in determining plaintiff's expectancy of life, and the loss of his earning power.—*Bunting v. Hogsett*, Penn., 21 Atl. Rep. 33.

163. MECHANIC'S LIEN—Foreclosure—Findings.—In a suit to foreclose a mechanic's lien for painting and graining a house under a contract with defendant, findings that plaintiff substantially performed the contract, and also that some small places were left unfinished which would cost about five dollars to finish properly, are not contradictory.—*Harlan v. Stufflebeem*, Cal., 25 Pac. Rep. 686.

164. MECHANIC'S LIEN.—Where material was being supplied from time to time as needed without reference to price, and certain other material was supplied upon an agreement as to price, *held*, that the furnishing of all the material may be treated as an entire transaction.—*State Manufacturing Co. v. Norwegian, etc. Seminary*, Minn., 47 N. W. Rep. 796.

165. MECHANIC'S LIEN—Husband and Wife.—A husband contracted for the sale of his wife's land it being provided that the vendee should build certain houses on the land, and that the vendor would advance money from time to time and that the title should not pass until the completion of the buildings. The contract was made in the husband's name but for the wife's benefit and she advanced all the moneys, etc.: *Held*, that work on such buildings and materials furnished therefor was done and furnished "with the consent of the owner," within the meaning of Laws N. Y., 1885, ch. 342. *Schmalz v. Mead*, N. Y., 26 N. E. Rep. 251.

166. MORTGAGE—Foreclosure—Sale.—Under Rev. St. Mo. 1879, § 3307, a sale is valid under a writ which sets out a copy of the judgment and a description of the mortgaged premises, and commands the sheriff to sell them, and to have the proceeds before the court on the first day of the next term, to satisfy said judgment in the manner as therein described.—*Lord v. Johnson*, Mo., 15 S. W. Rep. 73.

167. MORTGAGE—Redemption from Senior Mortgagee.—In an action to foreclose a real estate mortgage by a junior mortgagee, he may be permitted to redeem from senior mortgagees whose mortgages appear from the records to be due; and his right of redemption will not be affected by an agreement to extend the time of the payment of the senior mortgages, of which he has no notice at the time of the execution of his own mortgage.—*Wheeler v. Menold*, Iowa, 47 N. W. Rep. 871.

168. MORTGAGE—Growing Crops—Recording.—A judgment debtor having conveyed a growing crop as security for a debt before maturity of the crop, and the conveyance not having been recorded within 30 days, nor until after the crop had matured, and was levied upon by virtue of the judgment, the lien of the judgment was superior.—*Greene v. Franklin*, Ga., 12 S. E. Rep. 585.

169. MORTGAGE—Rights of Vendee.—A vendee of a parcel of land, subject, with others, to a mortgage, succeeds to the mortgagor's rights only in the parcel purchased, and cannot redeem the unalienated parcels from the mortgagee, who purchased them, under foreclosure proceedings instituted against them alone, for a price not greatly inadequate.—*Pine Bluff, M. & N. O. Ry. Co. v. James*, Ark., 15 S. W. Rep. 15.

170. MORTGAGE—Power of Sale.—A mortgage contained a power of sale authorizing the mortgagee, in case of default in the conditions of the mortgage, to sell the mortgaged premises at public auction, and convey the same to the purchaser, agreeably to the statute in such case made and provided: *Held*, that this was a complete and valid common law power, capable of being executed, even in the absence of any statute regulating the manner of its exercise.—*Webb v. Lewis*, Minn., 47 N. W. Rep. 803.

171. MORTGAGE—Ice Cut before Foreclosure.—A mortgagee and purchaser on foreclosure sale of ice-houses and of the right to cut ice from a pond does not acquire title to the ice cut and stored in the ice-houses by a lessee of the mortgagor before the foreclosure sale.—*Gregory v. Rosenkrans*, Wis., 47 N. W. Rep. 832.

172. MORTGAGE—Payment.—Where the purchaser of mortgaged property assumes the mortgage, and takes up the mortgage notes, the mortgage is thereby extinguished, and cannot be enforced by a subsequent purchaser of the notes after maturity.—*Theisen v. Dayton*, Iowa, 47 N. W. Rep. 891.

173. MORTGAGE—Foreclosure Sale—Time.—When a notice of foreclosure sale under the power in a mortgage states the hour of sale at 11 o'clock, a sale at 15 minutes before 11 is void.—*Richards v. Finnegan*, Minn., 47 N. W. Rep. 788.

174. MORTGAGE—Foreclosure.—In foreclosure by advertisement, the fact that the notice of sale claims more than is then due on the mortgage will not invalidate the sale, unless it appears that the claim was made by the mortgagee with a fraudulent purpose, or that it has resulted in actual injury to the mortgagor.—*Bowers v. Hechtman*, Minn., 47 N. W. Rep. 792.

175. MORTGAGE OF CROPS—Description.—A mortgage of all the cotton to be raised "on five acres of land situated on or in the south portion of the west field" on a farm does not include the cotton grown on five acres in the north part of the field, though that is the only cotton grown in the field.—*Darr v. Kempe*, Ark., 15 S. W. Rep. 14.

176. MUNICIPAL CORPORATION—Condemnation Proceedings—Notice.—To make proceedings for taking private property for public use valid, personal notice to the owner is not a constitutional requisite.—*Kuschke v. City of St. Paul*, Minn., 47 N. W. Rep. 786.

177. MUNICIPAL CORPORATION—Street Improvements.—A judgment in an action by the owners of property assessed, restraining the city officers from paying out any money in pursuance of the contract which provides the contractor should be paid on the estimate of the city engineer, cannot be sustained where the only finding as to wrong doing by the city officers is that the engineer improperly recommended payment.—*Union Cemetery Ass'n v. City of Buffalo*, N. Y., 26 N. E. Rep. 330.

178. MUNICIPAL CORPORATION — Improvement of Streets.—Though the statute contemplates the paving within the tracks in two feet of each side thereof by the street railroads at their own expense for which abutting owners cannot be required to contribute, yet a broad street may admit of general improvement as a system separate and distinct from the paving by the street railroads.—*Bacon v. Mayor*, Ga., 12 S. E. Rep. 580.

179. MUNICIPAL CORPORATION — Streets — Changing Grade.—A depreciation in the value of property abutting on a street resulting from a change of its grade by the municipality is not a taking of private property for public use, within the meaning of Const. Wis. art. 1, § 13.—*Smith v. City of Eau Claire*, Wis., 47 N. W. Rep. 830.

180. MUNICIPAL CORPORATION— Establishment of Fire Limits.—The grant to a municipal corporation of power to provide for the prevention and extinguishment of fires necessarily implies the right to establish fire limits, and prohibit the erection of wooden buildings therein.—*Hubbard v. Town of Medford*, Oreg., 25 Pac. Rep. 640.

181. MUTUAL BENEFIT SOCIETY — Assessment. — Construction of the back provisions of a mutual benefit society with reference to the assessments upon a forfeiture of membership by its members.—*Scheufler v. Grand Lodge*, Minn., 47 N. W. Rep. 799.

182. MUTUAL BENEFIT SOCIETY.— Upon the facts held that the payment of the assessment herein did not constitute a waiver by the society as the officers receiving them had no authority to waive its laws. — *Lyon v. Supreme Assembly*, Mass., 26 N. E. Rep. 236.

183. MUTUAL BENEFIT SOCIETY—Forfeiture.— Question of forfeiture of membership for failure to pay assessment, there being evidence of failure to receive notice thereof. — *Jackson v. Northwestern Mutual Relief Assoc.*, Wis., 47 N. W. Rep. 733.

184. MUTUAL BENEFIT SOCIETY—Beneficiary. — Where the by-laws of a mutual benefit association provide that the beneficiary in any certificate may be changed by its surrender and the payment of a fee, whereupon a new certificate would issue to the new beneficiary, a mere indorsement on a certificate by the holder thereof directing payment to one other than the beneficiary named therein is not sufficient.— *Jinks v. Banner Lodge*, Penn., 21 Atl. Rep. 4.

185. NEGLIGENCE— Remote and Proximate Cause. — A passenger on a street-car having been injured by a collision with a railroad car through the concurrent negligence of the two companies, neither can recover against the other.—*Texas, etc. Ry. Co. v. Doherty*, Tex., 15 S. W. Rep. 44.

186. NEGOTIABLE INSTRUMENT—Bona Fide Purchasers.—Where in an action on a note there is evidence from which the jury might find that the note was procured from defendant by fraud, the burden is on plaintiff to show that he or some former holder of the note had purchased it in good faith, before maturity, for full value, and in the usual course of business. — *Franc v. Dickinson*, N. Y., 26 N. E. Rep. 250.

187. NEGOTIABLE INSTRUMENT—Protest.—The banking house at which a promissory note was made payable having ceased to do business, *held* proper to make such demand at the only existing bank in the city.—*First National Bank v. Wever*, Tex., 15 S. W. Rep. 41.

188. OFFICIAL BOND—School Funds.— The sureties on a county treasurer's general bond are not liable for his default as to school funds, since he is required, by Code Miss. 1880, § 726, to give a separate bond to faithfully account for the school funds coming into his hands.—*State v. Hall*, Miss., 8 South. Rep. 464.

189. OFFICE—Appointment— Vacancy. — Under Pol. Code Cal. § 879, an appointee by the governor during a recess of the legislature, to fill a vacancy in the State board of health, holds until the qualification of his successor, notwithstanding § 1000 provides that such

appointee shall only hold office until the adjournment of the next session of the legislature.—*People v. Tyrrell*, 25 Pac. Rep. 684.

190. OFFICE—Title.—The death of an auditor-elect before he has qualified or entered on the duties of his office does not create a "vacancy" in the office, within the meaning of 3 Laws Mich. 1873, p. 1, which authorizes the governor to fill "any vacancy" in the office of auditor of Wayne county. — *Lawrence v. Hanley*, Mich., 47 N. W. Rep. 753.

191. OLEOMARGARINE—Illegal Sale—Intent.—Act. Pa. May 21, 1885 (P. L. 22), commonly known as the "Oleomargine Act," is a police regulation, and, in an action to recover the penalty for a violation thereof, it is immaterial that defendant was ignorant that the substance he sold as butter was of the prohibited composition.—*Com. v. Weiss*, Penn., 21 Atl. Rep. 10.

192. ORDERS—Assignment of Funds.—A general order, not drawn on any particular fund, cannot operate as an assignment of any fund of the drawer in the hands of the one on whom the order is drawn.—*Jones v. Cunningham*, Tex., 15 S. W. Rep. 38.

193. PAROL EVIDENCE—Notes—Stipulation. — The purchaser of chattels who gives notes for the price, on the backs of which is printed an agreement that the seller is to retain the title until the notes are paid, cannot, after having defaulted in payment, contradict the agreement by parol testimony, in action of detinue for the chattels.—*Seymour v. Farquhar*, Ala., 8 South. Rep. 466.

194. PAROL EVIDENCE—Promissory Note. — Parol evidence is admissible to show that joint makers of a note signed only as sureties.—*Vestal v. Knight*, Ark., 15 S. W. Rep. 17.

195. PAROL TESTIMONY — Options. — Where the president of a bank takes in his own name an option on all the land owned by a debtor firm, in which it is stipulated that in case he exercises the option a part of the price shall be deposited with the bank out of which its claims are to be paid, parol evidence is admissible to show that the president secured the option as the agent of the bank, and for its benefit.— *Northern Nat. Bank v. Lewis*, Wis., 47 N. W. Rep. 834.

196. PARTNERS—Compensation.—A partner is not entitled, unless under some special agreement, to any compensation for his skill, labor, or services while employed in the partnership business.—*Taylor v. Ragland*, La., 8 South. Rep. 467.

197. PARTNERSHIP—Dissolution.—*Held*, that although the facts herein effect a dissolution of the partnership, complainant notwithstanding his delay was entitled to share in the subsequent profits up to the time of taking the accounts.—*Major v. Todd*, Mich., 47 N. W. Rep. 841.

198. PARTNERSHIP—Dissolution—Accounting.— Immediately upon the voluntary dissolution of a firm, one of whose members is constituted by agreement the liquidating partner, a right of action accrues in his favor against his copartner, whose account, is overdrawn beyond what the partnership profits would possibly pay.—*Gray v. Green*, N. Y., 26 N. E. Rep. 253.

199. PATENTS—License—Forfeiture.—The State courts have jurisdiction of an action to enforce the forfeiture of a license to manufacture and sell patented articles, for the breach of conditions contained in the license itself, and declared by it to entail such forfeiture.—*Hyatt v. Ingalls*, N. Y., 26 N. E. Rep. 285.

200. PLEADING AND PROOF—Variance.—Under an allegation of a contract between the plaintiff and defendant, proof of a contract made between the defendant and another party, and assigned by the latter to the plaintiff, is not an immaterial variance, but a failure of proof.—*Dennis v. Spencer*, Minn., 47 N. W. Rep. 795.

201. PLEDGE.—Where a party holds a note as collateral security, and delivers it to the maker to pledge to a second party, with an obligation, when it shall have performed its functions, to be returned to him, to protect his indebtedness, the note is not extinguished, and the pledge lost.—*Cahn v. Ford*, La., 8 South. Rep. 477.

202. PRINCIPAL AND AGENT—Accounting.—Upon the facts held that defendant as an agent had no authority to modify a valid contract made in reference to the purchase of stock, and must account to the plaintiff on the basis of the contract before the modification.—*Kountz v. Gates*, Wis., 47 N. W. Rep. 729.

203. PRINCIPAL AND AGENT—Real Estate Transactions. —The employment of an agent to find a purchaser for real estate need not be in writing. — *McLaughlin v. Wheeler*, S. Dak., 47 N. W. Rep. 816.

204. PRINCIPAL AND AGENT—Specific Performance.— Where an agent makes an express contract in his own name to purchase land, and to give a deed of trust thereon to secure the unpaid purchase money, he alone can compel specific performance of the contract, though the vendor knew that he was acting for an unnamed principal.—*Kelly v. Thuey*, Mo., 15 S. W. Rep. 62.

205. PRINCIPAL AND SURETY—Judgment.—Where in an action against the principal and his surety judgment by default is rendered against the surety and afterwards the principal stipulates to allow judgment to go against him on condition that execution be stayed for a certain time the surety will not be presumed to have consented thereto, because he did not object to the stay, under Code Iowa sec. 3068.—*Okey v. Sigler*, Iowa, 47 N. W. Rep. 911.

206. PROCESS—Service of—Special Constable.—Section 1094 of the Code authorizes a justice of the peace, in certain cases, to deputize a person, to serve a summons. In making the appointment, it is not necessary to state therein that the justice was requested to make it, nor that it was expedient to do so, as these facts will be presumed from the appointment itself.—*Morse v. Carpenter*, Neb., 47 N. W Rep. 853.

207. PUBLIC LAND — Constructive Notice.— Where a patent recites that it is issued in pursuance of certain acts of congress to the "heirs and legal representatives" of the original claimant, and that the patentee is such and that he has procured a certificate of location on any public land, the purchaser from such patentee is charged with constructive notice of the rights of the heirs and legal representatives of the original claimant. —*Weeks v. Milwaukee, etc., R. Co.*, Wis., 47 N. W. Rep. 787.

208. QUIETING TITLE—Facts upon which court were justified in rendering a decree quieting title, to complainants property.—*Sock v. Suba*, Neb., 47 N. W. Rep. 859.

209 QUIETING TITLE—Jurisdiction.—In a suit by the owners of separate lots, who derive title from a common grantor, to quiet their title as against a defendant who claims to own all the lots, the amount in controversy is the value of all the lots owned by the complainants, and not the value of separate lots of each.—*Lovett v. Prentice*, U. S. C. C. (Minn.,) 44 Fed. Rep. 459.

210. QUIETING TITLE—Laches.—Upon the facts *held*, that plaintiff through long silence and delay with knowledge of adverse claims was estopped to assert title as against defendant.—*Withrow v. Walker*, Iowa, 47 N. W. Rep. 893.

211. QUO WARRANTO — Office—Unnaturalized Alien.— The constitution, making persons of foreign birth, who have not declared their intention to become citizens of the United States, ineligible to any elective office, disqualifies such persons from being legally elected. They are not entitled to hold office even though, after being elected, they declare their intention to become citizens. —*State v. Sullivan*, Minn., 47 N.W. Rep. 802.

212. RAILROAD COMPANIES — Accidents at Crossings.— Plaintiff drove upon defendant's track at a trot, without looking or listening for trains, though he knew when the trains ran, and could have seen the approaching train when he was 25 feet from the track: *Held*, that he was guilty of contributory negligence. — *Nash v. New York Cent. & H. R. R. Co.*, N. Y., 26 N. E. Rep. 266.

213. RAILROAD COMPANIES— Contributory Negligence. —*Held* that the question of contributory negligence of the plaintiff in crossing railroad track under the facts of this case sufficient evidence to go to the jury.—*Baltimore, etc., R. Co., v. Walborn*, Ind., 26 N. E. Rep. 207.

214. RAILROAD COMPANIES—Accident to Trains.—In an action against a railroad company for an accident caused by sand which had been washed upon the track, it is proper for the plaintiff to show that after the accident defendant changed its road at that point, where such testimony is offered for the purpose of explaining a subsequent photograph of the spot, which had been introduced in evidence, and of showing that the defect in the construction of the road could have been remedied.—*St. Louis, etc. Ry. Co. v. Johnston*, Tex., 15 S. W. Rep. 104.

215. RAILROAD COMPANIES—Crossing — Injunction. — Where a county court declares a road to be open as soon as certain fences are set and other conditions complied with, and the proposed road is left with railroad tracks, fences, and embankments crossing it for 11 years thereafter, and there is no proof that any of the said conditions were ever fulfilled the county authorities have no right to grant a street car company permission to lay its track along such road without the consent of the railroad company, and the laying of such track may be enjoined at suit of the railroad company.—*Cincinnati, etc. R. Co. v. Chattanooga, etc. Ry. Co.*, U. S. C. C. (Tenn.), 44 Fed. Rep. 470.

216. RAILROAD COMPANIES—Depots.—It is the duty of railroad companies to provide reasonable accomodations for passengers desiring to take passage on their trains.—*Tex., etc. R. Co. v. Mayes*, Tex., 15 S. W. Rep. 43.

217. RAILROAD COMPANIES — Injuries to Brakemen. — Nothwithstanding Pub. Acts Mich. 1883, page 191, there can be no recovery for the death of a brakeman who while voluntarily attempting to uncouple moving cars had his foot caught in an unblocked split switch when it appears that he was familiar therewith and had been warned of its danger.—*Brand v. Michigan, etc. R. Co.*, Mich. 47 N. W. Rep. 837.

218. RAILROAD COMPANIES — Injuries to Persons on Track.—A man walking towards a railroad station with the intention of buying a ticket and taking a train is not a passenger before he reaches the station.—*June v. Boston, etc. R. Co.*, Mass., 26 N. E. Rep. 238.

219. RAILROAD COMPANIES— Negligence. —A railroad company whose track runs through a city street is liable to the owners of adjoining property for damage thereto caused by the soot, smoke, and discomfort caused by running its trains.—*Louisville, etc. R. Co. v. Orr*, Ky., 15 S. W. Rep. 8.

220. RAILROAD COMPANIES—Regulation of Charges.—A railway company cannot claim immunity from State regulation in respect to rates because its right of way was granted by the government which declared it to be a post and military route and national highway for governmental service.—*St. Louis, etc. R. Co. v. Gill*, Ark., 15 S. W. Rep. 18.

221. RAILROAD CROSSING—Contributory Negligence.—While railroads are held to strict observance of all precautions necessary for the protection of the public in crossing the crowded streets of cities, there is also an obligation on the public to be vigilant and attentive. —*White v. Vicksburg, etc. R. Co*, La., 8 South. Rep. 475.

222. RAILROAD MORTGAGES — Bondholders.—The fact that the officers of a railroad company have violated its charter by issuing bonds secured by a mortgage in an amount greater than twice its paid-up capital stock will not entitle the company's general creditors, who became such with notice of the mortgage, to share the proceeds of the foreclosure sale on an equality with the *bona fide* purchasers of the bonds.—*Fidelity Insurance Co. v. West Penn., etc. R. Co.*, Penn., 21 Atl. Rep. 21.

223. RECEIVERS—Negligence.—Where several million dollars of the net earnings of a railroad, while in the hands of a receiver, have been invested in betterments and improvements, and the receiver has been discharged, and the property restored to the company, it is liable on a cause of action which accrued against the receiver for the destruction of a street-car by collision with a train.—*Brown v. Rosedale St. Ry. Co.*, Tex., 15 S. W. Rep. 120.

224. REMOVAL OF CAUSES—Motion to Remand.—Under Act Cong. Aug. 13, 1888, ch. 866, § 3, which provides that, when a proper bond and petition for removal are filed, "it shall be the duty of the State court to accept said petition and bond, and proceed no further in the case," where the record as certified shows that such bond and petition were filed, it will be presumed, on motion to remand, that they were duly accepted by the State court, though no order of removal was entered.—*Chatanooga, etc. R. Co. v. Cincinnati, etc. Ry. Co.*, U. S. C. C. (Tenn.), 44 Fed. Rep. 456.

225. REMOVAL OF CAUSES—Res Adjudicata.—Where a suit is removed to a federal court after the State supreme court has passed upon a demurrer filed in the suit, the decision on such demurrer is binding on the federal court.—*Lookout Mountain R. Co. v. Houston*, U. S. C. C. (Tenn.), 44 Fed. Rep. 449.

226. REPLEVIN—Counter-claim.—In an action of replevin by a mortgagee for the possession of mortgaged property where the plaintiff is permitted to retain the goods, the defendant may plead a sale of the property to the plaintiff and his refusal to take and pay for the goods is a counter-claim.—*Deford v. Hutchinson*, Kan., 25 Pac. Rep. 641.

227. REPLEVIN—Instruction.—In replevin, an instruction that, if the property was in the possession or under the control of plaintiff at the time of the commencement of the action, the jury should find for defendant, is erroneous, as in such case defendant is not entitled to possession of the property, but to costs only.—*Pyburn v. Moses*, Ark., 15 S. W. Rep. 84.

228. RES ADJUDICATA—Foreclosure—A judgment foreclosing a mortgage in a suit in which the question whether or not the mortgage was executed to defraud the mortgagor's creditors is not in issue does not preclude a creditor of the mortgagor, who was not a party to the forclosure suit, from attacking the mortgage on that ground.—*Brookes v. Munoz*, N. Y., 26 N. E. Rep. 258.

229 RES ADJUDICATA—Fraudulent Conveyances.—In an action by the assignee of a judgment to subject real estate to its payment, defendant is estopped to allege in defense a cause of action in his favor against the original judgment plaintiff, which he might have pleaded in the action in which the judgment was rendered.—*Baxter v. Myers*, Iowa, 47 N. W. Rep. 879.

230. SALE—Lien for Price.—Where the purchaser of a lot of fish scrap, under a contract by which the title to the property has passed to him, becomes insolvent before the fish are delivered, or any part of the price paid, the seller in possession has a lien for the price superior to the rights of the purchaser's attaching creditor. —*Tuthill v. Skidmore*, N. Y., 26 N. E. Rep. 348.

231. SALES—Measure of Damages.—In an action by the buyer against the seller for breach of contract for the delivery of corn, the measure of damages is, as a general rule, the market value of the corn at the time and place of delivery, less the contract price.—*New York Draper Mercantile Co. v. Lusk*, Kan., 25 Pac. Rep. 646.

232. SALE—Change of Possession.—*Held*, that the presumption of fraud from the retention of possession by the seller of stock of liquors was not rebutted by the evidence.—*Tillman v. Janks*, Tex., 15 S. W. Rep. 39.

233. SET-OFF—Joint and Separate Debts.—Defendant cannot set up as a counter-claim a debt owing to him by a firm of which plaintiff is a member, where it is not alleged that the firm is insolvent, and the other members are not made parties to the action; and on allegation that the other members of the firm are insolvent, but that plaintiff is solvent is sufficient.—*Spofford v. Rowan*, N. Y., 26 N. E. Rep. 350.

234. SIGNATURE BY MAKING MARK.—Under Civil Code Ky. § 732, subd. 7, failure to have a note, which is executed by the maker's making his mark, attested by a subscribing witness, does not render the note void, but requires actual proof of the execution.—*Vanover v. Murphy's Adm'r*, Ky., 15 S. W. Rep. 61.

235. SLANDER—Pleading—Variance.—Proof that the slanderous words were uttered some three weeks after

the date alleged in the complaint, and in a different county than the one alleged, does not constitute a material variance.—*Brueshaber v. Hertling*, Wis., 47 N. W. Rep. 725.

236. SPECIFIC PERFORMANCE—Mines.—In an action for specific performance of a contract to make a mining lease where proof was given that, worked in the manner intended, the earth would be liable to fall in, thus interfering with defendant's part and injuring the value of the mine, and that the lease would probably result in trouble and litigation, it was within the court's discretion to refuse specific performance.—*Miles v. Dover Furnace Iron Co.*, N. Y., 26 N. E. Rep. 261.

237. STATUTES—Enactment.—Questions upon the facts as to whether a bill was passed by the legislature as stated in the notes of the secretary.—*People v. Burch*, Mich., 47 N. W. Rep. 765.

238. STOCKHOLDERS—Liability.—Under Rev. St. Wis. §§ 1753, 1758, stockholders who have paid less than its par value for their stock, are liable to creditors of the corporation for the difference between that and its par value.—*Gogebic Inv. Co. v. Iron Chief Min. Co.*, Wis., 47 N. W. Rep. 726.

239. TAXATION — Exemption — Church Property.— A rectory or parsonage belonging to a church society, its primary use being for a secular purpose, to-wit, the residence of the priest or minister, is not exempt because of some part of it being also used for religious services.—*Ramsey County v. Church of the Good Shepherd*, Minn., 47 N. W. Rep. 783.

240. TELEGRAPH COMPANIES—Penalties.—A suit under the act of 1887, for the recovery of a penalty incurred by a telegraph company by reason of its failure to deliver a dispatch in due time is barred by section 2925, of the Code within one year from the time the company's liability thereto was discovered, or by reasonable diligence could have been discovered.—*Western Union Tel. Co. v. Nunnally*, Ga., 12 S. E. Rep. 578.

241. TIME—Computation.—Section 82, ch. 66, Gen. St., relating to the computation of time, was intended to establish a uniform rule, applicable to the construction of statutes as well as to matters of practice.—*Spencer v. Haug*, Minn., 47 N. W. Rep. 794.

242. TRADE-MARKS—Infringement.—In a suit to restrain infringement of plaintiff's trade mark it is no defense that defendant had a license for its use, where the contract for the license requires defendant to keep books, make returns, and pay royalties or forfeit the license, and it is shown that defendant failed to perform these conditions, and that plaintiff notified him that the license was terminated.—*Martha Washington Flour Co. v. Martien*, U. S. C. C. (Penn.), 44 Fed. Rep. 473.

243. TRESPASS TO TRY TITLE—Practice.—Under the Texas statute allowing a defendant in trespass to try title 20 days after the notice in which to file an abstract of title, when plaintiff serves such notice only 13 days before trial, he cannot object to defendant's introduction of written evidence of title because of the latter's failure to file the abstract.—*Barth v. Green*, Tex., 15 S. W. Rep. 112.

244. TRIAL—Evidence.—After a cause has been finally submitted, the court has no power, under Code, § 2799, to grant leave for the introduction of additional evidence.—*Dunn v. Wolf*, Iowa, 47 N. W. Rep. 887.

245. USURY—Foreclosure—Burden of Proof.—Usury must be strictly proved and the burden of proof is upon the party setting it up to establish it clearly.—*Berdan v. Trustees*, N. J., 21 Atl. Rep. 40.

246. VENDOR AND VENDEE—Statute of Frauds.—Where the real estate is induced by the fraud of the vendor, although such fraudulent representations may be in reference to a matter within the statute of frauds, the vendor will be liable for damages to his vendee.—*Foss v. Newbury*, Oreg., 25 Pac. Rep. 669.

247. VILLAGES — Prosecution — Sheriff's Fees. — The county can recover from a village therein the fees and charges paid to the sheriff for keeping in jail prisoners convicted of a violation of the village ordinance, whether the village authorities authorized the prosecutions or not.—*Waukesha County v. Village of Waukesha*, Wis., 47 N. W. Rep. 831.

248. WARRANTY—Measure of Damages.—In an action for the price of a stallion, where the answer alleges breach of a warranty that the horse was a "sure colt getter," the measure of damages is the difference between the value of the horse as actually received, and its value if he had been as warranted, and the reason able expense of advertising, keeping, and standing the horse during the season. — *Short v. Matteson*, Iowa, 47 N. W. Rep. 874.

249. WATERS — Overflowing Land—Damages.—Damages for the percolation and flowing of water upon one's land, from an artificial pond constructed by a city on adjoining land can be recovered only to the date of the writ, and not for a permanent injury.—*Aldworth v. City of Lynn*, Mass., 26 N. E. Rep. 229.

250. WATERS AND WATER COURSES—Dams.—Where a canal company constructs a dam across a natural stream, which flows down through plaintiff's land, and discharges the water thereby detained in larger amounts than the stream will carry, causing the same to overflow the land, it is guilty of a trespass, and liable for the injuries caused thereby, though it was authorized to construct the dam, and the same was constructed in a proper manner.—*McKee v. Delaware & H. Canal Co.*, N. Y., 26 N. E. Rep. 305.

251. WATER COMPANIES—Street Mains.—Act of legislature authorizing private corporation to supply water to a city *held*, to authorize a contract with a corporation organized to supply the city with water to also lay mains in the streets.—*City of Duluth v. Duluth Gas & Water Co.*, Minn., 47 N. W. Rep. 781.

252. WIFE'S POWER TO CHARGE HER SEPARATE ESTATE. —A mortgage of her separate estate, given by a married woman to secure the payment of her husband's debts to the mortgagee, is invalid in South Carolina.—*People's Nat. Bank of Charleston v. Epstin*, U. S. C. C. (S. Car.), 44 Fed. Rep. 403.

253. WIFE'S SEPARATE ESTATE.— The fact that a deed by a husband to his wife shows on its face that the land was a gift is sufficient to make the land her separate estate, and, in an action to recover it, it was not prejudicial error to permit him to testify that such was his intention.—*Callahan v. Houston*, Tex., 14 S. W. Rep. 1027.

254. WIFE'S SEPARATE ESTATE—Conveyance.—A married woman who sells her separate property, and stipulates the right to redeem, and remains in possession of the property, cannot be made to deliver it, when it is proven that the only amount with which she could be charged has been paid by her since the sale, and the remainder of the price was her husband's debts.—*Krouse v. Neal*, La., 8 South. Rep. 471.

255. WILL—Construction. — A testator devised to his son certain land in Mississippi, "being forty-one eighths of land, if I gain the suits against H, depending in the chancery court at Columbus; also four sections of my Texas land scrip to be taken by lots:" *Held* that the devise of the Texas land was not contingent upon the result of the suit.—*Yeatman v. Haney*, Tex., 14 S. W. Rep. 1045.

256. WILLS—Construction.—Testator devised his land in fee-simple to his son and daughter. A subsequent, paragraph of the will was as follows: "I direct my said executor to take charge of my said daughter's interest of my estate, and invest the same for her benefit, or, should she elect to have her entire interest in the farm during her natural life, at her death to see that her children only derive any and all benefit from said estate." *Held*, that this did not create a trust in the land, and hence the daughter's title is such that specific performance of a contract to convey it may be decreed. —*In re Lebling's Estate*, Penn., 21 Atl. Rep. 15.

257. WITNESS—Refreshing Memory—Memoranda.—A witness cannot refresh his memory by the use of a copy of a memoranda made by him, without accounting for the absence of the original.—*Byrnes v. Pacific Express Co.*, Tex., 15 S. W. Rep. 46.